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Supreme Court of the United States

OCTOBER TERM, 1955

No. 60

LOUIS BERRA, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 2, 1955.

CERTIORARI GRANTED DECEMBER 5, 1955.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

No. 15,214.
CRIMINAL.

LOUIS BERRA,
APPELLANT,

vs.

UNITED STATES OF AMERICA,
APPELLEE.

No. 15,215.
CRIMINAL.

LOUIS BERRA,
APPELLANT,

vs.

UNITED STATES OF AMERICA,
APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

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Indictment.

(Filed in U. S. District Court on May 20, 1954.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,

v.

No. 27857 (2).

Lou Berra,
Defendant.

The Grand Jury charges:

1. That on or about the 28th day of July, 1953, a United States Grand Jury, duly empaneled and sworn to inquire within and for the body of the Eastern District of Missouri, then holding its sessions at St. Louis, Missouri, in said District, commenced an investigation concerning among other things, violations of the Anti-Racketeering statute and the Federal revenue laws; that except for intermittent recesses the said Grand Jury investigation has been continuous from July 28th, 1953 until the date of this indictment; that said Grand Jury has been assisted in its efforts by agents of the Bureau of Internal Revenue, who have conducted extensive investigations into possible violations of the revenue laws aforesaid.

2. That beginning on or about the first day of February, 1954 and continuing up to and including the date of this indictment, said Grand Jury and agents of the Bureau of Internal Revenue have conducted an investigation and inquiry into, among other things, the financial affairs of the St. Louis Labor Health Institute, located at 1127 Pine Street in St. Louis, Missouri, and the financial affairs of defendant Lou Berra; that said Grand Jury and agents of the Bureau of Internal Revenue have conducted investigations and inquiries into the repair and remodeling of the

building at 1127 Pine Street, St. Louis, Missouri, owned by St. Louis Labor Health Institute and occupied by it and others, for the purpose of determining whether St. Louis Labor Health Institute had filed proper and accurate financial statements with the Bureau of Internal Revenue, whether its officials and employees had filed proper and accurate tax returns with the Bureau of Internal Revenue, and whether said organization or its officials or employees had violated the Federal revenue laws.

3. That one John C. Schmidt had personal knowledge and information of and concerning the payment of monies to him by St. Louis Labor Health Institute for the painting of its premises during the years 1951, 1952 and 1953, and the "kick-back" of part of such payments by him to Lou Berra.

4. That Lou Berra had personal knowledge that the said John C. Schmidt had in his possession certain cancelled checks and the stubs therefor, which he had drawn on the Mound City Bank & Trust Company from 1951 through 1953 in the approximate aggregate amount of $5,000.00, some of which had been made payable to cash and given to Lou Berra, and others of which had been made payable to Lou Berra and given to him in pursuance of a plan whereby John C. Schmidt billed the St. Louis Labor Health Institute for amounts greater than were properly due him, and by agreement with Lou Berra, paid over to him by check the amount of such additional sums received from St. Louis Labor Health Institute. That Lou Berra also had personal knowledge that the said John C. Schmidt had in his possession certain weekly job records purporting to show labor and material expended on the St. Louis Labor Health Institute building at 1127 Pine Street, which records also indicate the additional amounts charged by him to St. Louis Labor Health Institute, equaling payments made by him to Lou Berra.

And the Grand Jury further charges:

5. That during the week beginning February 21, 1954 and continuing to the date of this indictment, at St. Louis,

Missouri, in the Eastern Division of the Eastern District of Missouri, and within the jurisdiction of this Court,

Lou Berra,

defendant herein, well knowing all the premises aforesaid and knowing that the said John C. Schmidt would be called before said Grand Jury as a witness to testify with his records, did knowingly, unlawfully, feloniously and corruptly endeavor to influence the said Schmidt, a witness who was to appear before said Grand Jury, and to obstruct, influence and impede the due administration of justice in the following manner, to wit:

6. That on or about February 21, 1954, the defendant Lou Berra by telephone called John C. Schmidt at his home in St. Louis County, Missouri, told him that St. Louis Labor Health Institute was being investigated by the Grand Jury and Revenue agents, and that he was afraid the "kickbacks" he had received from the said John C. Schmidt would be investigated by the Grand Jury and Revenue agents, and told the said John C. Schmidt to destroy all cancelled checks, stubs and records showing payments to him, Lou Berra, to the end that knowledge thereof would be withheld from the Grand Jury.

7. That subsequently, on or about February 22, 1954, the defendant Lou Berra by telephone called John C. Schmidt at his home in St. Louis County, Missouri, asked him whether he had destroyed all cancelled checks, stubs and records showing payments to him, Lou Berra, and again told John C. Schmidt to destroy the same, to the end that knowledge thereof would be withheld from the Grand Jury.

8. That subsequently, on or about February 23, 1954 the defendant Lou Berra by telephone called John C. Schmidt at his home in St. Louis County, Missouri, asked him whether he had destroyed all cancelled checks, stubs and records showing payments to him, Lou Berra, and again told John C. Schmidt to destroy the same, to the end that knowledge thereof would be withheld from the Grand Jury.

In violation of Section 1503, Title 18, United States Code.

Count Two.

1. The Grand Jury adopts as a part of this count all of the allegations contained in paragraphs numbered 1 to 4 inclusive of the first count of this indictment and by reference incorporates the same herein.

And the Grand Jury further charges:

2. That on or about the 13th day of April, 1954, and continuing to the date of this indictment, at St. Louis, Missouri, in the Eastern Division of the Eastern District of Missouri, and within the jurisdiction of this Court,

Lou Berra,

defendant herein, well knowing all the premises aforesaid and knowing that the said John C. Schmidt would be called before said Grand Jury to testify as a witness with his records, did knowingly, wilfully, unlawfully, feloniously and corruptly endeavor to influence the said John C. Schmidt, a witness who was to appear before said Grand Jury, and to obstruct, influence and impede the due administration of justice in the following manner, to wit:

3. That on or about April 13, 1954 John C. Schmidt called defendant Lou Berra at his home in St. Louis, Missouri and told him that agents of the Bureau of Internal Revenue had asked him about payments to Berra. That defendant Lou Berra then told John C. Schmidt to tell the Grand Jury that Berra had borrowed money from Schmidt and had paid it back in cash, all of which the defendant Lou Berra knew was untrue.

4. That on or about April 14, 1954, the defendant Lou Berra called John C. Schmidt at his home in St. Louis County, Missouri, and told him to tell the Grand Jury the same story that he, Berra, would tell them, to wit, that Berra had borrowed three, four or five thousand dollars from Schmidt and had paid him back in cash, which story the defendant Lou Berra knew was untrue. That in the same conversation Lou Berra stated that if John C. Schmidt told the Grand Jury the truth he, Lou Berra, would be stuck for perjury; and that if Schmidt got into any tax trouble through telling Berra's story, he, Lou

Berra, would pay the taxes and penalties; all for the purpose of obstructing, influencing and impeding the due administration of justice.

In violation of Section 1503, Title 18, United States Code.

A True Bill.

ROBERT S. GREENE,
Deputy Foreman, Acting as Foreman.

HARRY RICHARDS,
United States Attorney.

MAX H. GOLDSCHEIN,
Special Assistant to the Attorney General.

WM. K. STANARD,
Special Assistant United States Attorney.

Indictment.

(Filed in U. S. District Court on May 28, 1954.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America, Plaintiff,
v.
Louis (Lou) Berra, Defendant.
No. 27866 (2).

The Grand Jury charges:

That on or about the 17th day of March, 1952, in the Eastern Division of the Eastern District of Missouri,

Louis (Lou) Berra,

a resident of St. Louis, Missouri, who during the calendar year 1951 was married, did willfully and knowingly at-

tempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1951, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Missouri, at St. Louis, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of $5,177.22 and that the amount of tax due and owing thereon was the sum of $566.54, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $8,669.88, upon which said net income there was owing to the United States of America an income tax of $1,324.42.

In violation of Section 145 (b), Title 26, United States Code.

Second Count.

The Grand Jury further charges:

That on or about the 25th day of February, 1953, in the Eastern Division of the Eastern District of Missouri,

Louis (Lou) Berra,

a resident of St. Louis, Missouri, who during the calendar year 1952 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1952, by filing and causing to be filed with the District Director of Internal Revenue for the St. Louis, Missouri, Collection District at St. Louis, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of $5,514.50 and that the amount of tax due and owing thereon was the sum of $691.42, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $7,464.50, upon which said net income there was owing to the United States of America an income tax of $1,149.86.

In violation of Section 145 (b), Title 26, United States Code.

Third Count.

The Grand jury further charges:

That on or about the 3rd day of March, 1954, in the Eastern Division of the Eastern District of Missouri,

Louis (Lou) Berra,

a resident of St. Louis, Missouri, who during the calendar year 1953 was married, did willfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1953, by filing and causing to be filed with the District Director of Internal Revenue for the St. Louis, Missouri, Collection District at St. Louis, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of $5,293.34 and that the amount of tax due and owing thereon was the sum of $775.52, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $6,193.34, upon which said net income there was owing to the United States of America an income tax of $984.76.

In violation of Section 145 (b), Title 26, United States Code.

A True Bill.

Elmer C. Carlisle,
Foreman.

HERBERT H. FREER,
Assistant United States Attorney.

United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America, Plaintiff,

v.

Louis (Lou) Berra, Defendant.

No. 27866 (2).

Bill of Particulars.

Comes now the United States of America and supplies the following information requested in defendant's motion for a bill of particulars, and says:

1. The nature and kind of the items claimed by the plaintiff to make up the total gross income is as follows:

(a) Income as listed in the individual tax returns of the defendant for the years covered by the indictment, namely, 1951, 1952, and 1953.

(b) Payments received by the defendant either in check, cash or merchandise from John F. Schmidt, John F. Schmidt Painting Company, J. Schulman and Sons, Harry Schulman, Al Schulman, Melcher-Schene Hardware and Lumber Company, Labor Health Institute, Inc., and Warehouse Distribution Workers' Local 688, AFL.

2. Plaintiff states that the nature of the records which will be relied on by it to show income are as follows: individual and firm tax returns, cancelled checks, work papers, bank records consisting in part but not limited to ledger sheets and deposit tickets, bills, statements, invoices, job cost sheets, weekly and daily labor records, delivery receipts, gross receipts records, check registers, check stubs, cash disbursement records.

3. Plaintiff further states that the items on the tax return claimed to be false and fraudulent for the year 1951 are as follows: lines 2, 3, 4, 5 (a), and 7 of page 1; and all other figures, entries and calculations used in arriving at these entries.

4. Plaintiff further states that the items on the tax return claimed to be false and fraudulent for the year 1952 are as follows: lines 2, 3, 4, 5 (a), 7, and 8 of page 1, and all other figures, entries, and calculations used in arriving at these entries.

5. Plaintiff further states that the items on the tax return claimed to be false and fraudulent for the year 1953 are as follows: lines 2, 3, 4, 5 (a), and 7 of page 1, and all other figures, entries and calculations used in arriving at these entries.

6. Plaintiff further states that all deductions against the claimed total gross income as shown on the return are allowed in computing the alleged net income.

7. Plaintiff states that it is not computing net income under Section 41 of the Internal Revenue Code.

HARRY RICHARDS,
United States Attorney,
CHARLES H. REHM,
CHARLES H. REHM,
Assistant United States Attorney.

Copy of the above bill of particulars served on Louis (Lou) Berra, by mailing a copy to Stanley M. Rosenblum, his attorney of record, at 408 Olive St., St. Louis 2, Mo., this 10th day of September, 1954.

CHARLES H. REHM,
CHARLES H. REHM,
Assistant United States Attorney.

Transcript of Trial Proceedings.

At the trial of the above-entitled and numbered causes, consolidated for the purposes of trial, commencing on September 27, 1954, before Honorable Rubey M. Hulen, Judge, and a jury, in his courtroom in the United States Court House at St. Louis, Missouri, the following proceedings were had:

A panel consisting of two groups—twenty-eight regular jurors and three alternate jurors—was called by the Clerk, at the direction of the Court, and each group separately sworn by the Clerk for the purpose of voir dire examination.

Voir Dire Examination of Jurors.

The Court: Members of the Jury Panel, there are for trial this morning two criminal cases based on indictments returned by the Grand Jury. The defendant in each of these cases is Louis Berra. The plaintiff is United States of America. The two cases have been consolidated and they will be tried before the same jury. You will return separate verdicts as to each case, but the testimony in the cases will be offered lumped, without any separation as to the two cases. You don't need to concern yourselves about the complication that may arise from trying two cases at once, because I am sure we will be able to eliminate any matters of that kind from your minds.

The first case—I will call it first, because it is the indictment that has the higher number—is an indictment against the defendant in three counts, and it is an indictment charging the defendant with filing a false and fraudulent income tax return.

The first count of the indictment refers to the tax return filed by the defendant for the year 1951 and charges in specific figures—which it is not necessary for me to mention now—but charges that the defendant understated his income for the purpose of lowering his tax liability, and thereby he defrauded the Government of the difference between his alleged true income and the amount he reported.

Th second count is a like charge, except it refers to the income tax return filed by the defendant for the year 1952.

The third count of this indictment is a like charge, with the exception that it refers to the income for the return filed by the defendant for the year 1953.

That is the gist of the first indictment, or the indictment carrying the higher number.

The second indictment is a different charge and a charge of a different nature and character. It sets forth, in substance, that a Grand Jury was in session in July, of 1953,

and that they were investigating violations of the Internal Revenue Act with respect to income tax returns, and also with respect to certain alleged violations of the Anti-Racketeering Statute on the Federal Statutory Tax. It then sets forth that they were investigating the financial affairs of the St. Louis Labor Health Institute and of the defendant, Louis Berra; and that in that connection they were investigating the cost and expense of a remodeling to a building at 1127 Pine Street, which was owned by the St. Louis Labor Health Institute, and that a man by the name of John C. Schmidt—S-c-h-m-i-d-t—had information, it is charged in the indictment, of so-called "kick-back" money paid by the Labor Health Institute, I presume, to John C. Schmidt, apparently for work on this building, but the money was paid back to the defendant, Louis Berra. And it is charged that they were investigating that matter, and that while this matter was going on, it is charged that the defendant knew that Schmidt had certain information regarding the alleged kick-backs charged in the indictment, and that the defendant, Louis Berra, contacted him, either I think by telephone or some other process, and at the time the Defendant Berra called he knew that he was a witness, and endeavored to influence his testimony before the Grand Jury and asked him to destroy certain checks and records with regard to the transaction, so that the Grand Jury would not be able to get possession of them. That is the charge in the first count.

The charge in the second count is somewhat similar; that the defendant sought to obstruct, influence, and impede justice by advising and beseeching this same party; Schmidt, to testify before the Grand Jury to matters that were not true; in other words, to give perjured testimony.

Now, that is the gist of the two counts of the second indictment; the major element.

Now, to the charge in each count of each of these indictments, the defendant has entered a plea of not guilty, and this trial is to determine the guilt or innocence of the defendant in each of these two cases and under each of the counts in the two cases.

Under our law, the defendant, under these circumstances, is presumed to be innocent, and the burden rests upon

the Government to prove his guilt beyond a reasonable doubt, and as to any charge which the Government fails to prove the defendant guilty beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Now, in the trial of this case, the Government is entitled to twelve good jurors; and I say to you with equal emphasis that the defendant is entitled to twelve good jurors. Now, what do I mean by twelve good jurors? I mean twelve jurors, each and every one of whom will enter into the trial of this case with an open mind. By that I mean a mind without any feeling that the defendant is guilty of the charge, and ready to receive and listen to the testimony without any bias or prejudices for or against the Government or for or against the defendant. I mean a jury that will listen to the evidence conscientiously and seriously, because this is a serious matter both for the Government and for the defendant; listen to my charge as to the law, after you have heard the evidence, and that then you will go out to your jury room and vote for that verdict which in your mind and heart you believe to be called for solely by the evidence that you have heard in this court room, under the charge I give you as to the law. That is what I mean by a good juror.

Now, my purpose in examining is two-fold. First of all, to secure a panel of good jurors, and then, second, to give counsel on both sides information that they may use in determining what jurors they will strike. After we have got the panel, each side will have the right to strike a certain number of names, and when they have finished, why, there will be twelve jurors left, and one alternate, that are here to try this case.

Now, at the outset, I want to ask you, do either of you, at this time, before I have gone into the details of the matter, know any reason that would prevent you from being a good juror, under the definition that I have given you of what a good juror is?

Do either of you have any bias or prejudices of any kind that come to your mind at this time? Not going into it in detail, but as a preliminary, I am asking you that question.

Now, if you can answer any of these questions in the affirmative, raise your hand.

The defendant is Louis Berra. Will you please stand, Mr. Berra?

(The defendant stands up.)

The man standing at the counsel table is the defendant in this case. You may have a seat. Do either of you know the defendant in this case? If so, raise your hand.

Did either of you ever have any personal dealings with him? Did any of you ever have any other dealings with him indirectly, that you know of, through someone else?

I understand that Mr. Berra is connected with Teamsters Union Local No. 688. Have either of you personally ever had any dealings with that Union—first, I will ask you with respect to labor matters? Mr. Knight?

Juror Nelson Lawnin: Lawnin.

The Court: Lawnin. When was that? How long ago?

Juror Lawnin: A year and a half ago, the company I am connected with had a seven-months' strike.

The Court: Did you have anything to do with the negotiations in connection with that strike?

Juror Lawnin: Not personal negotiations.

The Court: Not personal. Do you know whether or not Mr. Berra was involved in this matter, or did you hear his name mentioned?

Juror Lawnin: Yes, sir.

The Court: You did. Very well.

Now, anyone else? I will extend that now not only to you, but to business connections that you have. Mr. Lawnin has answered with reference to his business, and what is that business, Mr. Lawnin?

Juror Lawnin: N. O. Nelson Company.

The Court: They are in the contracting business?

Juror Lawnin: No. They are wholesalers of plumbing union supplies.

The Court: I see.

Now, any member of this jury connected with any business institution that had any negotiations with that union with reference to labor matters, that you know of?

Now I will broaden it. Do you know, or, first, I will ask you if either of you personally had any business—I don't mean labor matters—if you sold them automobiles or if you had any business dealings with them aside from labor business dealings? If so, raise your hand.

Do you know of any business that you are connected with, do you know if they had any business dealings with the union that I have mentioned?

Are either of you a member of that union?

Have either of you ever been a member of that union?

How many of you are members of any labor union? Mr. Adams, what union are you a member of?

Juror Leland Adams: St. Louis Printing Pressmen's Union of this city.

The Court: Have you ever been an officer of that union?

Juror Adams: No.

The Court: And how long have you been a member of that union?

Juror Adams: About thirty years.

The Court: About thirty years. Now, Mr. McDonald.

Juror Edward A. McDonald: Brotherhood of Railway Firemen.

The Court: Have you ever been an officer of the union?

Juror McDonald: No, sir.

The Court: How long have you been a member of that union?

Juror McDonald: About eighteen years, sir.

The Court: About eighteen years. Now, did anyone else in the back row raise his hand? Now the front row?

Mr. Bulley, what union are you a member of?

Juror Charles M. Bulley: Local 50, Building Labor Union.

The Court: Have you ever been an officer of the union?

Juror Bulley: No.

The Court: How long have you been a member?

Juror Bulley: About thirty-five years.

The Court: Now, did anyone else raise your hand in the third row?

Now, then, I will ask the gentlemen in the chairs here, are either of you members of any union?

And the lady, also?

I take it from your silence that you are not.

Have you ever been members of a union? If so, raise your hand.

Mr. Finnical—is that the way you pronounce it? What union were you a member of?

Juror Waiter Finnical: I was a member of the Teamsters' Union.

The Court: How long ago?

Juror Finnical: Oh, it has been, I guess, seven or eight years ago.

The Court: Seven or eight years ago. Here in St. Louis?

Juror Finnical: No.

The Court: Where?

Juror Finnical: At De Soto, Missouri.

The Court: And do you know whether or not Mr. Berra had any connection with that union?

Juror Finnical: I don't know.

The Court: Did you ever hear his name mentioned?

Juror Finnical: I did not.

The Court: Did you leave that union under friendly circumstances?

Juror Finnical: I just discontinued paying my dues.

The Court: I see, but there was no trouble when you left?

Juror Finnical: None whatever.

The Court: I have forgotten, Gentlemen—are either of you representatives of any union? And have you ever been?

Are either of you—the members of your family—and I want to let you know first, inform you of what I mean by family. I mean your father or mother, or your wife, or your children, or your brothers, or sister. Are any of the members of your family, to your knowledge, officers of any union? Or active in any union?

Are any of the members of your family, to your knowledge, active in any capacity opposing matters, programs let us say, of unions, to your knowledge? That is where unions may undertake to organize or may have a strike in progress, are any of the members of your family involved in any transaction or circumstances of that kind at this time, to your knowledge? If so, raise your hand.

In addition to Mr. Lawnin, how many of you are connected with firms that have union employees, that is, the employees are represented by a union, regardless of what union it is?

Mr. Limberg, what union is that?

Juror Charles F. Limberg: It is the Bill Posters' Union, Your Honor. I don't know the number.

The Court: Bill Posters' Union?

Juror Limberg: Yes.

The Court: You have anything to do with the negotiations with the union?

Juror Limberg: No, sir.

The Court: Nothing whatever?

Juror Limberg: No.

The Court: And the next gentleman?

Juror Herman J. Brenner: Brenner.

The Court: Mr. Brenner, what union?

Juror Brenner: Electrical Workers.

The Court: Electrical Workers. Do you have to do the negotiations with the union?

Juror Brenner: Yes, sir.

The Court: And has there been anything recently, any negotiations recently?

Juror Brenner: It will be two years in April.

The Court: Two years in April.

Juror Brenner: Another contract coming up next year.

The Court: You are active yourself in those negotiations?

Juror Brenner: I sit in.

The Court: Does Mr. Berra, to your knowledge, ever get in the negotiations?

Juror Brenner: No, sir.

The Court: Now, the next gentleman.
Mr. McEntire.

Juror Wesley H. McEntire: Postal Employees' Union.

The Court: Postal Employees.

Juror McEntire: Yes, sir.

The Court: What is your employment?

Juror McEntire: Mail carrier.

The Court: What is that?

Juror McEntire: Mail carrier.

The Court: You are a mail carrier?

Juror McEntire: Yes, sir.

The Court: This gentleman is a Government employee. Do you have any objection to him? I will excuse him, if you want him excused.

Mr. Hennelly: Would like to have him excused, yes.

The Court: Mr. McEntire, in view of the fact that you are an employee of the Government, I will excuse you at this time.

Call another juror.

(Another juror, Walter J. McKane, is called and sworn.)

The Court: Anyone else on this jury panel who is an employee of the Government? If so, raise your hand. Very well.

Mr. McKane, did you hear my statement of what this case is about?

Juror McKane: Yes, sir.

The Court: And you have heard my questions in regard to being members of a union?

Juror McKane: Yes, sir.

The Court: Are you a member of any union?

Juror McKane: No, sir.

The Court: Have you ever been?

Juror McKane: Years ago. I guess about twenty-five years ago, I was a member of the Clerks' Union in East St. Louis.

The Court: What union was that?

Juror McKane: Railway Clerks.

The Court: Railway Clerks. Was there any trouble at the time you left the union?

Juror McKane: None whatever.

The Court: Left it on friendly terms?

Juror McKane: Yes, sir.

The Court: Now I will go back to the question I was asking. Are either of you connected with firms that employ representatives of some union or members represented by unions? Are you?

Juror McKane: I am with the Springmeier Shipping Company.

The Court: You may keep your seat.

Juror McKane: And I am connected with the Teamsters' Union, but I have nothing to do with negotiations.

The Court: You have nothing whatsoever to do with negotiations.

Juror McKane: No, sir.

The Court: Now, in the front row, how many of you are employed by or connected with firms that employ union labor?

Mr. Bulley, how is your connection made?

Juror Bulley: Well, I work for a construction company and they employ union labor.

The Court: Oh, I see. And Mr. Eckles?

Juror Roy K. Eckles: Longshoremen's Union.

The Court: And do you have anything to do with negotiations?

Juror Eckles: No, sir.

The Court: Nothing whatsoever?

Juror Eckles: No, sir.

The Court: Now, then, I will go down in the chairs. I will ask you if you are connected with firms that employ union labor?

Mr. Klein?

Juror Earl T. Klein: Yes. Bank Building & Equipment Corporation. We use union labor in all of our construction branches.

The Court: Do you have anything to do with negotiations?

Juror Klein: No.

The Court: Nothing whatsoever?

Juror Klein: No.

The Court: Now I will ask you three gentlemen—is it Mr. Landwehr?

Juror Harold E. Knight, Sr.: Knight.

The Court: Mr. Knight. And what company are you connected with?

Juror Knight: Machinists' Union.

The Court: Do you have anything to do with negotiations with the union?

Juror Knight: No.

The Court: How long has it been since you had any negotiations?

Juror Knight: We signed our last contract in March, this year.

The Court: Anyone else You three gentlemen?

Juror Lawnin: I answered.

The Court: You answered that question a while ago, Mr. Lawnin. Now I will ask you gentlemen who have answered the question that you are connected with firms that employ union labor, has anything ever happened in connection with the employment of union labor or in your negotiations on disputes or contracts with union labor, that would cause you to have any bias or prejudice against this defendant in this case? I understand that he is an officer—is he an officer of this local?

Mr. Hennelly: He is an officer, Your Honor.

The Court: He is an officer of the Teamsters' Local, is that right?

Mr. Hennelly: That is correct.

The Court: Officer of the Teamsters' Union. He is being tried, as I said a moment ago, for income tax alleged evasion, and also charged—being tried on a charge of obstruction of justice. Now, has anything ever happened that, in your judgment, would prevent you from being a good juror, as I defined that term earlier in this case? If so, raise your hand. I take it from your silence that you all feel that nothing has happened in those circumstances that would in any way prevent you from being a good juror in this case. Now, consider that each of these questions, while I am asking them of the panel as a whole, is addressed to you individually.

I will broaden that question that I asked you a moment ago, now, and I will ask you if there are any members of your family that are employed by or connected with firms that employ union labor, that have had any troubles with

them in the contract negotiations or otherwise, that you know about, that would in any way affect you as a juror in this case? If so, raise your hand.

The Government in this case is going to be represented by Mr. Stanard, an Assistant United States Attorney, and I now present Mr. Standard to you. And the Government is also going to be represented by Mr. Rehm, and I now present Mr. Rehm to you. Mr. Richards is United States District Atto ney, and I take it that he will not be present actively in the case. Now, do either of you know either of the counsel for the Government?

Mr. Limberg, which gentleman do you know?

Juror Limberg: I know Mr. Standard, sir.

The Court: How long have you known him?

Juror Limberg: Thirty-five years.

The Court: Has that been a personal or casual relationship.

Juror Limberg: I would say personal.

The Court: Now, would that in any way affect you as a juror in this case from rendering a verdict based wholly and solely on the evidence and my charge as to the law?

Juror Limberg: It will not.

The Court: And do you have any hesitancy, or do you have any desire to render a verdict in this case, influenced by the fact that Mr. Stanard is counsel?

Juror Limberg: I would not.

The Court: It would not affect you in the slightest. Now, another gentleman raised his hand.

Juror Ottis L. Livesay: I have met Mr. Stanard. That is practically all.

The Court: Just met him socially. You are not personally acquainted with him. Now, would that in any way affect you as a juror in this case?

Juror Livesay: No.

The Court: Now the next gentleman, Mr. Boyd.

Juror Augustus S. Boyd, Jr.: I know Mr. Stanard. And is that Mr. Harry Richards?

The Court: Yes.

Juror Boyd: I know him also.

The Court: Now, would the fact that Mr. Richards is District Attorney and Mr. Stanard, I presume, will take the lead here in representing the Governent in this case, would that in any way affect you as a juror in this case?

Juror Boyd: Not at all.

The Court: Not in the slighest? Is your relation with Mr. Stanard a personal or casual one?

Juror Boyd: Personal one.

The Court: Personal.

Juror Boyd: Social, I would say.

The Court: Social. Has he ever represented either you or Mr. McDonald in any legal matters?

Juror Boyd: No, sir.

The Court: Mr. Limberg?

Juror Limberg: No, sir.

The Court: Now anyone else in the back row or chairs? Now in the front row, anyone there know any of the Government counsel?

I will go down to the row of chairs. Anyone there know any of the Government counsel? Mr. Hunker, which gentleman do you know?

Juror William L. Hunker: Harry Richards. I knew him, I guess twenty five or thirty years ago. I haven't, I mean, recently.

The Court: Was that a casual relation or personal one?

Juror Hunker: That was casual.

The Court: Has he ever represented you in any legal matter?

Juror Hunker: No.

The Court: Would that acquaintance in any way affect you as a juror in this case?

Juror Hunker: No.

The Court: The defendant in this case is represented by Mr. Hennelly, and I now present Mr. Hennelly to you. And he is represented by Mr. Stanley Rosenblum, and I now present Mr. Rosenblum to you. And Mr. Rosenblum is a member of the firm of Rosenblum, Goldenhersh, and Silverstein. Correct? Do either of you know counsel for the defendant? If so, raise your hand? Or any member of the firm I mentioned?

I asked you a moment ago if you were presently, any of you, employed by the Government. Have either of you ever been employed by the Government? And I exempt Military Service, and the Army, and the Navy, and the Marine Corps, and the Air Corps. Aside from that, have any of you ever been employees of the Government? Mr. McDonald?

Juror McDonald: Except the time when the Government took over the railroads and certain crises.

The Court: Well, that was kind of an involuntary service. And anyone else?

By a Juror: I don't know if you care to include the Conservation Corps Service.

The Court: Beg pardon?

By the Juror: I don't know if you care to include the Conservation Corps Service.

The Court: Well, I will include it. You were in the Conservation Corps? Anyone else? Mr. Finnical?

Juror Finnical: I was in ..... Administration.

The Court: When was that?

Juror Finnical: I think it was 1935 or 1936.

The Court: It has been some years since you were connected with it?

Juror Finnical: Yes.

The Court: Anyone else that has been connected with the Government in any capacity?

Now, I will broaden it. Are any of the members of your family at this time employees of the Government?

By Juror Brockmeyer: I believe I should answer yes on that.

The Court: Mr. Brockmeyer?

Juror Brockmeyer: I have a son worked there during the summer down at the Air Force Survey.

The Court: Your son works some months during the summer. Is he in school?

Juror Brockmeyer: He is in school, yes.

The Court: And during his vacation he worked with the Air Map Survey. He doesn't have a steady job, I take it.

Juror Brockmeyer: No.

The Court: Has he gone back to school?

Juror Brockmeyer: But he is a member of the Station Service now.

The Court: He has a Station Service standing. I see. And he is in school now?

Juror Brockmeyer: Yes, sir.

The Court: You heard my description of the charges in these two indictments. Have either of your ever heard either of those cases discussed at any time by anyone? Did anyone ever attempt to tell you anything about the circumstances relating to them? If so, raise your hand.

I don't know what, if anything, was in the newspapers in reference to these charges or in reference to Lou Berra, but do either of you at this time recall reading anything in any newspaper or any publication of any character about Lou Berra and his relations and activities with the union? If so, raise your hand. Mr. Finnical?

Juror Finnical: A small article in this morning's paper.

The Court: In the Globe-Democrat. And is that the only one you recall reading?

Juror Finnical: Yes.

The Court: And I believe, Mr. Garnholz, you raised your hand?

Juror Edward S. Garnholz: Yes. I saw the article. I just glanced over it this morning.

The Court: But that is the extent of your reading?

Juror Garnholz: Yes.

The Court: Anyone else? Mr. Boschert?

Juror Boschert: I saw that in this morning's Globe.

Juror Brockmeyer: I saw the article in the Globe.

The Court: Mr. Brockmeyer. And Mr. Lawnin, did you read something in the newspaper?

Juror Lawnin: Yes, in connection with 688.

The Court: I beg pardon?

Juror Lawnin: In connection with that 688 negotiations with our company over two or three years they mentioned.

The Court: As well as the article this morning?

Juror Lawnin: Yes.

The Court: Anyone else now?

Now, have either of you ever heard this case, or what you assumed to be these cases, or any activities of Louis Berra, discussed or any statements made regarding this matter over the radio? If so, raise your hand. Mr. Holliday? When do you recall hearing anything?

Juror Grover Holliday: A couple of weeks ago.

The Court: Do you recall what you did hear, or just that you heard something about them?

Juror Holliday: I just heard something about them. I never paid any attention to it.

The Court: Can you tell now—do you recall now what you did hear?

Juror Holliday: No, I couldn't.

The Court: Now, the next gentleman? Mr. Hunker—or Mr. Kapplemann.

Juror Erwin J. Kapplemann: I just heard it over the radio coming down here this morning.

The Court: I beg pardon?

Juror Kapplemann: I heard it over the radio coming down here this morning.

The Court: Do you recall what you heard on the radio?

Juror Kapplemann: No. Just that the trial was beginning.

The Court: That the trial was beginning this morning. Now, I will ask the members of the jury who have said they heard something over the radio or they read something in some publication, whether or not they read anything or heard anything that would prevent them from trying this case fairly and impartially, as good jurors?

Did you hear or read anything that made any impression on your mind as to the guilt or innocence of this defendant or caused you to be prejudiced for or against the Government or for or against the defendant in any way? If so, raise your hand.

How many of you have ever served as a Grand Juror? I am not inquiring now as petit jurors, such as you are now serving, but as a Grand Juror, how many of you have ever served on a Grand Jury in the United States District Court, in St. Louis or anywhere else? If you have ever so served, will you please raise your hand? Mr. Finnical, was it in St. Louis?

Juror Finnical: It was in Jefferson City on a Grand Jury.

The Court: Well, that was a State Grand Jury, wasn't it?

Juror Finnical: Yes. Not the Federal.

The Court: Not a Federal. Now, anyone who has served on a Federal Grand Jury? I take it by your silence that none of you have. Now, I will extend that to include State Grand Jury, and I understand, Mr. Finnical, that you served on a State Grand Jury. How long ago?

Juror Finnical: I believe, Your Honor, it was in 1950.

The Court: Were there any matters with reference to labor relations with employers investigated during that service?

Juror Finnical: No.

The Court: That did not come before your Grand Jury. Now, anyone else serve as a State Grand Juror?

How many of you heretofore have served as a juror in a Federal Court, such as you are now, and served on a criminal case? Please raise your hands. Mr. Adams, when was that?

Juror Adams: In 1952, in Harper's court, Judge Harper's court.

The Court: 1952. Do you remember the nature of the case that you served on the jury there?

Juror Adams: It was a damage suit.

The Court: Well, now, I am not talking about civil cases. This was a civil case?

Juror Adams: That was a civil case.

The Court: I mean cases in which the Government has charged someone with the commission of a crime.

Juror Adams: No, I haven't sat on any.

The Court: Now, anyone who has served on such a panel, if you will merely raise your hand.

Mr. Holliday?

Juror Holliday: Yes, sir.

The Court: How long ago was that?

Juror Holliday: I think it was 1952.

The Court: 1952. In whose court?

Juror Holliday: This court.

The Court: In this court?

Juror Holliday: Yes.

The Court: Do you remember what the nature of the case was?

Juror Holliday: Automobile theft.

The Court: Automobile theft. And did you just serve in the one criminal case?

Juror Holliday: The only one I served.

The Court: Now, anyone else? Before I proceed further, I will go back again. Any matter that has come up during the entire examination I have been making that causes either of you to doubt your ability, if you are retained as a juror, to be a good juror in this case? If so, raise your hand.

Have either of you ever had any difficulty, let us say differences of opinion, with the Government, with respect to income tax alleged liability, let us say first of yourself personally? If either of you have ever had that experience, in which you thought the Government was making a claim against you for income tax or taxes of any kind which you felt you were not obligated to pay? If you have ever had that experience and negotiations took place between you and the Government, will you please raise your hand? Mr——

Juror Brockmeyer: Brockmeyer.

The Court: Brockmeyer. How long ago was that?

Juror Brockmeyer: About four years ago.

The Court: Has the matter been terminated?

Juror Brockmeyer: Oh, yes.

The Court: Now, did anything take place during that matter that would cause you to have any bias or prejudice for or against the Government or for or against the defendant in a case of this character that I mentioned?

Juror Brockmeyer: No.

The Court: Your answer is "no"?

Juror Brockmeyer: Yes.

The Court: Now, anyone else? Mr. Holliday? When was your experience?

Juror Holliday: It was about four years ago.

The Court: Has the matter been disposed of?

Juror Holliday: Yes, sir.

The Court: Did anything happen during that time that would cause you to have any bias or prejudice against the Government?

Juror Holliday: No, sir.

The Court: Or against a defendant in a case of this character?

Juror Holliday: They didn't want me to deduct percentage for property that I was renting, they said I had the property at the end.

The Court: Well, now, going back to my question, would you have any bias or prejudice in this case for or against the Government, or for or against the defendant, because of your experience at that time?

Juror Holliday: No.

The Court: Your answer is "No." Now, anyone I missed?

By a Juror: Are you asking about personal or company?

The Court: Personally, I am asking now. Now I will ask Mr. Klein.

Juror Klein: Several years back, there was just a little difference of that kind.

The Court: Has it been disposed of?

Juror Klein: Right.

The Court: Now, did anything in that connection that would cause you to have any bias or prejudice in this case if you are retained as a juror?

Juror Klein: No.

The Court: Now, have I covered everyone who has had some personal experience?

Now I will go to business and ask if any of you are connected with businesses in which you have a financial interest, or an officer, or occupying some other executive position—how many of you are connected with a business

that has had discussions, arguments, or contests with the Government over tax matters? Raise your hand.

Juror Brenner: May I ask a question, Your Honor?

The Court: Yes.

Juror Brenner: You mean as sitting in?

The Court: Mr. Boyd?

Juror Brenner: This is Brenner.

The Court: Mr. Brenner.

Juror Brenner: Do you refer to sitting in with counsel of your company?

The Court: Well, I will broadened to if you had any connection with the Government whatsoever, sitting with or advising with counsel or actually engaging in negotiations.

Juror Brenner: No, sir.

The Court: Were you connected in any way with it?

Juror Brenner: No, just hearsay in the company.

The Court: You heard of negotiations, you mean, generally?

Juror Brenner: As a member of the management, just the hearsay of the corporation. Not in on any trial.

The Court: Now, did you hear anything which would cause you to have a bias or prejudice in this case?

Juror Brenner: No, sir.

The Court: You did not.

Now, one of the three gentlemen here raised his hand. Mr. Knight?

Juror Knight: Yes. We had a case before the Tax Board about ten years ago.

The Court: And it has been disposed of for several years. Did anything happen in that case that would cause you to have any bias or prejudice in this case?

Juror Knight: No. We won that case.

The Court: Ladies and gentlemen, I cannot at this time tell you what my instructions are going to be as to the law of this case. After I have heard the evidence, then I will determine what rules and principles of law should govern you in your determination of the factual issues, and when the evidence is in and counsel have concluded their arguments, I will give you a charge containing my understanding of what the law is that should govern this case, but I cannot tell you now what I am going to tell you then, because I don't know what will be the law to govern this case until I hear the facts, but I want to ask you this question: You, as jurors, are to pass upon the factual issues. That is your sole province. It is my sole province to determine the law and tell you what the law is that you are to follow and must follow in determining those factual issues. Now, is there any member of this jury panel that would refuse or feel any inclination to deviate or cast aside my instructions to you as to the law and not follow them conscientiously, is there any juror that has any belief about his idea of the law now, and if the instructions to you differ, let us say, that you would follow your ideas of the law and not mine? It would be your sworn duty to follow the law as I give it to you, not what your ideas may be about the law. Now, is there any juror that has any belief, idea, or thought that he could not follow the law as I give it to you in this case? If so, raise your hand. I assume from your silence then that each of you will follow the law as I give it to you in deciding the factual issues. If there is any doubt on that matter in the minds of either of you, please raise your hand.

Is there anyone of you have any beliefs, suspicion, or idea that you can think of, of any kind, that would prevent you from giving the Government in this case a fair trial or would prevent you from giving the defendant in this case a fair trial? If so, raise your hand.

Have either of you or any member of your family ever been in painting contracting business? I take it from your silence you have not.

Do either of you know Mr. O. E. Troxler, who is connected with the Mound City Bank & Trust Company? Mister——

Juror Brenner: Brenner.

The Court: Mr. Brenner, you know Mr. Troxler?

Juror Brenner: Yes, sir.

The Court: Is that a personal relation or casual one?

Juror Brenner: Well, business, personal business.

The Court: You do business?

Juror Brenner: Do my business with the Mound City Bank and I come in contact with Mr. Troxler.

The Court: And is that the only way you come in contact with Mr. Troxler?

Juror Brenner: Yes, sir.

The Court: You don't visit at his home?

Juror Brenner: No, sir.

The Court: And he does not visit in yours?

Juror Brenner: No, sir.

The Court: That is, if you had some matters with the bank, then would you take them up with Mr. Troxler?

Juror Brenner: Yes, I would.

The Court: When is the last time you had a conference with him on business matters?

Juror Brenner: Well, I would say four or five months ago.

The Court: Are any of you ladies and gentlemen depositors with the Mound City Trust Company? What that has to do with the case, I don't know, but counsel desires to know. You are, Mr. Brenner and——

Juror Edmond F. Horstdaniel: Horstdaniel.

The Court: Mr. Horstdaniel?

Juror Horstdaniel: Yes.

The Court: How long have you been a depositor?

Juror Horstdaniel: I would say at least twenty-five years, maybe longer.

The Court: Do you know Mr. Troxler?

Juror Hortsdaniel: Only indirectly.

The Court: You have never had——.

Juror Horstdaniel: I have had some business dealings.

The Court: You have never had any dealings with him of any kind?

Juror Horstdaniel: No. Only indirectly.

The Court: Any members of this panel who are members of the Chamber of Commerce—I presume you mean of the City of St. Louis.

Mr. Hennelly: Yes, your Honor.

The Court: Of the City of St. Louis. If so, raise your hand.

By a Juror: Individually or personally?

The Court: Individually. Mr. Knight and Mr. Horstdaniel.

Do you want to know whether they are connected with business?

Mr. Hennelly: I might, your Honor, just raise their hands.

The Court: Either of you connected with business institutions, as an officer or official, interested in institutions that are members of the St. Louis Chamber of Commerce? Mr. McKane?

Juror McKane: Only the firm I work for is a member.

The Court: And Mr. Brenner?

Juror Brenner: The firm I work for is a member.

The Court: And Mr. Livesay?

Juror Limberg: Mr. Limberg.

The Court: Mr. Limberg?

Juror Limberg: The firm I work for is a member.

The Court: And Mrs. Fawley, that is your firm you work for. And Mr. Eckles, the firm you work for. And Miss Cooke, the firm you work for.

Juror Miss Constance M. Cooke: The firm I work for.

The Court: And Mr. Lawnin, the firm that you work for. Mr. Horstdaniel, the firm you work for.

Juror Horstdaniel: Yes. I am also a member of the Shippers Conference Committee.

The Court: Of which conference?

Juror Horstdaniel: Shippers Conference Committee.

The Court: The Shippers Conference Committee?

Juror Horstdaniel: That is right. That is part of one of the committees.

The Court: Does that committee have anything to do with the negotiations with labor unions?

Juror Horstdaniel: No.

The Court: It does not. And Mr. Boyd?

Juror Boyd: The firm I work for is a member.

The Court: Question: Have either of you read any material, printed material—not anything I have covered here by a previous question, but I will ask you here now, have any of you read any printed material, such as pamphlets or other printed matter issued by the Chamber of Commerce, bearing on labor matters or labor trouble? Mr. Horstdaniel and Mister——

Juror Knight: Knight.

The Court: Mr. Lawnin and Mr. Knight. I will ask you three gentlemen, how long has it been since you read matters of that kind?

Juror .....: Well, as far as I am concerned, I get a weekly bulletin published by the United States Chamber of Commerce.

The Court: And you read it as related——

Juror .....: I read that every week.

The Court: Yes. Now, you gentlemen, how long has it been since you had matters of that kind?

Juror .....: Well, I couldn't tell you. We get bulletins from them all the time, and I read the bulletins,

and I know they have some matters regarding labor matters in there, but how long ago that would be, I don't know.

The Court: You don't remember that, you remember though it was on labor subjects.

Juror .....: Yes.

The Court: Is that correct? And Mr. Lawnin?

Juror Lawnin: All labor matters of that sort cross my desk and I see them continually.

The Court: Any member of the panel who has ever testified for either the State in a case in the State Court, or the Federal Government in a case in the United States Court, for the State or for the Government? If so, raise your hand. At any time, in any criminal case? I take it from your silence that none of you has.

Have either of you ever been the victims of a crime? By that, I mean any criminal act ever been committed that affected you? It may have been a holdup, it may have been a robbery, or it may have been your car stolen. I am talking about where you were the victim of a crime. Now, have either of you ever been in that position?

Juror .....: Just an ordinary holdup you are in?

The Court: Yes. Anyone else? Mr. Limberg?

Juror Limberg: Yes, sir. Car stolen, but it didn't affect me, but I had it taken away.

The Court: Well, it could have affected you, I presume, if you did not have insurance. And Mr. Boyd?

Juror Boyd: Our apartment was broken into and a great many things stolen from it.

The Court: Anyone else? Mr. Knight?

Juror Knight: House burglary.

The Court: Anyone else? Mrs. ——

Juror Mrs. Lillian B. Forbes: Forbes.

The Court: Mrs. Forbes.

Juror Forbes: House was broken into.

The Court: Now, anyone else? Mr. Hunker, Mr. Brockmeyer. Anyone else?

Do either of you know Pete Saffo—S-a-f-f-o? Bill Latal—L-a-t-a-l? Dick Kabner? Do either of you know Harold Rubin, the Certified Public Accountant?

Now, ladies and Gentlemen, I want to ask you some personal questions. Mr. Adams, you live at Warrenton, Missouri?

Juror Adams: Yes.

The Court: And you are in the business of manufacturing ice cream?

Juror Adams: Yes.

The Court: Are you the owner of the business?

Juror Adams: Yes.

The Court: And how long have you been so engaged?

Juror Adams: About twenty years.

The Court: One year?

Juror Adams: Twenty years.

The Court: Oh, twenty years. And Mr. Livesay, you live at 5979 Arsenal Street?

Juror Livesay: Yes, sir.

The Court: In St. Louis, is that right?

Juror Livesay: That is right.

The Court: And you are now retired?

Juror Livesay: Yes, sir.

The Court: What was your business before you retired?

Juror Livesay: I was with Anheuser-Busch for twenty years.

The Court: In what capacity?

Juror Livesay: I was treasurer the last twelve years.

The Court: And Mr. McDonald, you live at 7036 Holly Hills Drive?

Juror McDonald: Yes, sir.

The Court: And you are a mechanic, and whom are you employed by?

Juror McDonald: Terminal Railroad Association.

The Court: Terminal Railroad Association. How long have you been so employed?

Juror McDonald: About twenty years.

The Court: And Mr. Boschert, is that the way you pronounce it?

Juror Boschert: Boschert.

The Court: You live at 722 North Sixth Street, in St. Charles, Missouri, and you are engaged in the real estate business?

Juror Boschert: Yes, sir.

The Court: How long have you been so engaged?

Juror Boschert: Four and a half years.

The Court: Mr. Boyd, you live at 901 Kent Road. Is that in the County or in the City?

Juror Boyd: Yes, sir, Ladue.

The Court: In Ladue. And you are in the brokerage business?

Juror Boyd: Yes, sir.

The Court: Are you self-employed?

Juror Boyd: No, I am not.

The Court: What company are you with?

Juror Boyd: Albert Dawson (phonetic) & Son.

The Court: How long have you been in that business?

Juror Boyd: About thirty years.

The Court: And Mr. Brenner, you live at No. 14 Craig Road, in Creve Coeur, Missouri, and you are a factory superintendent?

Juror Brenner: Yes, sir.

The Court: Whom are you employed by?

Juror Brenner: Moloney Electric Company.

The Court: And Mr. Brockmeyer, you live at 2008 Virginia Avenue?

Juror Eugene T. Brockmeyer: Yes, sir.

The Court: And you are now retired?

Juror Brockmeyer: Yes, sir.

The Court: And what was your business before you retired?

Juror Brockmeyer: I was with the Mississippi Valley Barge.

The Court: And what was your position with the barge line?

Juror Brockmeyer: Office manager.

The Court: And Mr. McKane, you live at 6219 Walsh Street?

Juror McKane: Yes, sir.

The Court: And you are Freight Traffic Manager for whom?

Juror McKane: Springmeier Shipping Company.

The Court: And Mr. Bulley, you live at 3507 Evans Avenue, and you are a building laborer?

Jurror Bulley: Yes, sir.

The Court: And are you employed by one contractor all the time?

Juror Bulley: No.

The Court: Just whatever contractor happens to be doing a job, you work there, do you?

Juror Bulley: I have been on this job a little over a year, but that is unusual.

The Court: And what company is that?

Juror Bulley: (Indistinct) ..... Construction Company.

The Court: And Mrs. Bussmann—is that the correct pronunciation?

Juror Mrs. Catherine G. Bussmann: Yes.

The Court: You live at 4950 Lindell Boulevard?

Juror Bussmann: Yes.

The Court: And you are a housewife?

Juror Bussmann: Yes.

The Court: What is your husband's occupation?

Juror Bussmann: He is President, Bussmann Manufacturing Company.

The Court: And Mr. Carr, you live at Potosi?

Juror Carr: Yes, sir.

The Court: And you are Assistant Manager of the Power Company?

Juror Carr: Not now, no. I was until March.

The Court: Up until March. What power company was that?

Juror Carr: Arkansas-Missouri Power Company.

The Court: And what has been your occupation since that time?

Juror Carr: Poultry farm, actually.

The Court: In the neighborhood of Potosi?

Juror Carr: Yes.

The Court: And Mr. Clark, you live at 6924 Garner Avenue?

Juror Clark: No. 5333 Pershing now.

The Court: What is your occupation, Mr. Clark?

Juror Clark: I am manager—— (Indistinct).

Mr. Hennelly: I am sorry, Your Honor, I didn't catch that.

The Court: Will you speak just a little louder, so everybody can hear you?

Juror Clark: Branch Manager Hessler Sporting Goods Company.

The Court: Miss Cooke, you live at 7545 Cromwell Drive, Clayton?

Juror Cooke: Yes, sir.

The Court: And what is your occupation? Now, if you will speak so counsel are all able to hear you.

Juror Cooke: Secretary, Mississippi River Fuel.

The Court: Did you hear her?

Mr. Hennelly: Yes, Your Honor.

The Court: Mr. Craig, you live at 3116 North Taylor?

Juror Craig: Yes, sir.

The Court: And you are a cement contractor?

Juror Craig: Yes, sir.

The Court: Are you self-employed?

Juror Craig: I was before, but I ain't doing anything now, actually.

The Court: Are you working for anyone now?

Juror Craig: No.

The Court: But you have your own business, so to speak, and do your own jobs. Do you employ union labor?

Juror Craig: No.

The Court: You did not?

Juror Craig: No.

The Court: Mr. Dankel, you live at Route 11, in Lemay?

Juror Dankel: Yes, sir.

The Court: And what was your business before retiring?

Juror Dankel: Shipping room.

The Court: And whom were you employed by?

Juror Dankel: Anheuser-Busch.

The Court: And Mr. Eckles, you live at 3123 St. Vincent Avenue?

Juror Eckles: Yes, sir.

The Court: And whom are you employed by?

Juror Eckles: Corneli Seed Company.

The Court: Corneli Seed Company. And you are a foreman?

Juror Eckles: Yes, sir.

The Court: What department?

Juror Eckles: Packaging and packing seeds.

The Court: Packaging Department?

Juror Eckles: Yes.

The Court: And Mrs. Fawley, you live at 1612 Hunter, in Richmond Heights?

Juror Fawley: Yes, sir.

The Court: And what is your husband's occupation?

Juror Fawley: He is a salesman.

The Court: Mr. Finnical, you live at 401 South Fifth Street, in DeSoto, and you are a merchant. What is the nature of your business?

Juror Finnical: I have beer distributing agency and marketing place.

The Court: How long have you been so engaged?

Juror Finnical: In business for myself since 1943.

The Court: And Mrs. Forbes, you live at 4944 Northland Place, and what is your husband's occupation?

Juror Forbes: He operates a cab on a Blue Jay Taxicab Line.

The Court: You are not employed?

Juror Forbes: No.

The Court: Mr. Garnholz, you live at No. 4 Lorenzo Lane, in Ladue?

Juror Garnholz: Yes, sir.

The Court: And what was your occupation before you retired?

Juror Garnholz: I was formerly in the antique business in Clayton, three years ago, and then I retired.

The Court: And you had your own business?

Juror Garnholz: Yes, sir.

The Court: Mr. Greenleaf, you live at 301 Henquin Drive?

Juror Greenleaf: Henquin Drive.

The Court: In Ferguson?

Juror Greenleaf: Yes, sir.

The Court: And you are with the United Shoe Machinery Company?

Juror Greenleaf: Yes, sir.

The Court: You are one of the officers of the company?

Juror Greenleaf: Salesman.

The Court: I beg pardon?

Juror Greenleaf: Salesman.

The Court: You are a salesman?

Juror Greenleaf: Yes, sir.

The Court: How long have you been with that company?

Juror Greenleaf: Twenty-four years. It will be twenty-five this December 29th.

The Court: And during that time, have you been a salesman all the time?

Juror Greenleaf: No. Once twenty-three years in the leather business. Since then I have been a salesman.

The Court: Mr. Holliday, you live at Festus, Missouri?

Juror Holliday: Yes, sir.

The Court: And you are a barber?

Juror Holliday: Yes, sir.

The Court: Do you have your own shop?

Juror Holliday: Yes, sir.

The Court: Mr. Horstdaniel, you live at 5429 Delor Street.

Juror Horstdaniel: No, Your Honor. 8711 Pardle Lane—P-a-r-d-l-e.

The Court: Is that in the County?

Juror Horstdaniel: That is in the County.

The Court: And what is your occupation?

Juror Horstdaniel: Well, I am employed as Traffic Manager. I also have charge of civil production control.

The Court: Traffic Manager for whom?

Juror Horstdaniel: At Monarch Metal Weatherstrip Company.

The Court: And in addition to that, what is your other work there?

Juror Horstdaniel: I have charge of production.

The Court: Production?

Juror Horstdaniel: Yes.

The Court: For the same company?

Juror Horstdaniel: Yes.

The Court: How long have you been with that company?

Juror Horstdaniel: Thirty-five years.

The Court: Mr. Hunker, you live at 7233 Cornell, in University City?

Juror Hunker: Yes.

The Court: And what was your business before you retired?

Juror Hunker: Union Electric.

The Court: In what capacity?

Juror Hunker: Superintendent of the Meter Department.

The Court: Superintendent of the Meter Department. Mr. Kappleman, you live at New Haven?

Juror Kappleman: Yes.

The Court: And you are a truck driver?

Juror Kappleman: Yes.

The Court: Whom do you drive a truck for?

Juror Kappleman: Home Oil Company.

The Court: Is that a locally-owned company?

Juror Kappleman: Yes, sir.

The Court: I presume you drive out over the County to stations?

Juror Kappleman: Yes, sir. Rural farms.

The Court: Mr. Klein, you live at 651 Cleveland Avenue?

Juror Klein: Yes, sir.

The Court: In Kirkwood?

Juror Klein: Right.

The Court: You are Director of Sales for the Bank Building and Equipment Company?

Juror Klein: Yes, sir.

The Court: How long have you been so employed?

Juror Klein: Eight years.

The Court: And Mr. Klott, you live at Hermann?

Juror Klott: Yes, sir.

The Court: And you are a farmer?

Juror Klott: Yes, sir.

The Court: Do counsel for the Government have any further questions?

Mr. Stanard: May it please the Court, would like a question as to whether any of them have sued or been sued by the Government.

The Court: Do you have any questions?

Mr. Hennelly: Yes, Your Honor. With respect to the two gentlemen that know Mr. Troxler. Mr. Troxler has

been subpoenaed as a witness and he is going to testify—(balance out of hearing).

The Court: Anything else?

(Mr. Hennelly speaks further to the Court, out of hearing of the jury.)

The Court: I will ask this further question: Have either of you ever been sued by the United States Government in any capacity, for any reason, for any purpose, and in any character of suit whatsoever which was initiated by the United States against you? If you have been in that situation, please raise your hand.

Does that answer your inquiry?

Mr. Stanard: Sued or been sued.

The Court: Sued or been sued?

Mr. Stanard: Yes.

The Court: Have you ever had that experience? Have any of you ever had a suit against the United States Government for any purpose or character, or nature, or description? If so, please raise your hand.

I am informed that a Mr. Troxler, or Traxler, the gentleman who we mentioned a moment ago, will be a witness for the Government. Would the fact that Mr. Troxler is a witness for the Government, would that cause you to be biased, that you gentlemen who said they knew him, would that affect you in any way from trying this case, and basing your verdict wholly and solely on the evidence and the law as I give it to you?

In other words, the fact that Mr. Troxler is going to be a witness, would that cause you to try this case any different or conduct yourselves any different than if somebody else was a witness in place of Mr. Troxler, would that have any affect upon you whatsoever? If so, please raise your hand.

(Mr. Hennelly speaks to the Court out of the hearing of the jury.)

The Court: Mr. Garnholz, is it any relative of yours who is running for District Attorney in the County?

Juror Garnholz: Yes, sir. My son.

The Court: Your son. Has he ever discussed this case with you or any criminal case?

Juror Garnholz: No, sir.

The Court: Or your services as juror here?

Juror Garnholz: No.

The Court: Anything else.

Mr. Hennelly: That will be all, your Honor.

The Court: Mr. Limberg, did I ask your occupation?

Juror Limberg: No, sir, you did not.

The Court: I beg pardon.

Juror Limberg: You did not.

The Court: I will now ask you that further question, what is your occupation?

Juror Limberg: I am a salesman.

The Court: For whom?

Juror Limberg: Al Fresco Advertising Company.

The Court: And I will ask you gentlemen here—Mr. Knight, you live at 360 Oakwood, Webster Groves?

Juror Knight: Yes, sir.

The Court: You are president of the W. B. Knight Machinery Company?

Juror Knight: Yes.

The Court: And Mr. Landwehr, you live at 4510 Marlboro Court, and what was your business before you retired?

Juror Landwehr: I was with the Southwestern Bell Telephone Company. I was the General Building and— (balance indistinct).

The Court: And Mr. Lawnin, you live at 14 Wydown Terrace, and of what company are you an executive?

Juror Lawnin: I am Executive Vice President of the N. O. Nelson Company.

The Court: Very well. Give the list to counsel.

Members of the Jury Panel, you have been here since 10:00 o'clock. I will give you a ten minutes' recess. When you come back, be sure to occupy the same seats that you are occupying now. You may now pass out.

(11:30 a. m. The Jury retires from the Court Room.)

At 11:41 a. m., the Court sent for Government counsel to come in, and thereafter the following occurred:

The Court: It appears Mrs. Fawley called my attention, I omitted to ask her her occupation. Would you want to state that now?

Juror Fawley: Over a period of ten years, I worked for G. Myron Gwinner. They are market analysts.

The Court: Did you then quit your work?

Juror Fawley: Yes.

The Court: Did I ask you your husband's occupation?

Juror Fawley: Yes, sir, you did.

The Court: Very well.

Mr. Rehm: Your Honor, I didn't understand what business that was. Office management.

The Court: Will you indicate?

Juror Fawley: Not office management. I was employed by G. Myron Gwinner. Market analysts.

The Court: That is why I asked you to come in, Gentlemen.

Thereafter, at 12:10 p. m., on the same day, a jury, consisting of twelve regular jurors and one alternate, was duly impaneled and sworn.

The Court: Mr. Knight, as an alternate juror, may I say this to you: Throughout this trial just consider that you are one of the regular jurors, conduct yourself in every respect as though you were; go with the jury whenever it is necessary for the jury to go, to any place or at any time. You are selected so that if, during the course of this trial, for any reason it should become necessary to excuse a juror, a juror should become sick or anything

of that kind, you can take his place. It doesn't mean that you should feel your services can extend only to the end of the trial, at that time that you have got to go by the board. So, therefore, you should be in a position to step into the regular panel of twelve just the same as if you had been there all the time. Do I make myself plain?

Juror Knight: Yes, sir.

The Court: Now I say to all twelve of the jurors, and to the alternate as one of the jurors as well, remember the charge I gave you and the comments I gave you before you were called on this panel. You have all been qualified as good jurors to try this case.

Mr. Stanard thereupon made his opening statement to the Court and the jury on behalf of the Government.

The Government offered the following evidence:

ELMER C. CARLISLE testified as follows:

Direct Examination, by Mr. Stanard.

My name is Elmer C. Carlisle; I live at 1527 Claytonia Terrace, Richmond Heights; I am sales manager for the Dolan Realty Company and have been with the Dolan Company for twenty-one years. I am the foreman of the Federal Grand Jury for the Eastern District of Missouri, Eastern Division. This Grand Jury was impaneled on July 28, 1953, by Honorable George H. Moore. The Grand Jury was sworn on that same day, July 28, 1953, and I was sworn as foreman of the Grand Jury on that same day. The Grand Jury is still in session (it was stipulated by the defendant that the allegations in the indictment in Case No. 27857 as to what the Grand Jury was investigating are true, that the Grand Jury was investigating the financial affairs of the St. Louis Labor Health Institute and the tax returns of its officials and employees, that the Grand Jury was assisted in its investigation by agents of

the Internal Revenue Department and that the defendant was aware of these facts). I recognize the defendant Louis Berra. He has testified on four occasions before the Grand Jury. He testified on February 23, 1954, March 26, 1954, April 5, 1954, and April 22, 1954 (it was stipulated that the defendant had been a witness before the Grand Jury on these dates in 1954).

E. M. FLINN testified as follows:

Direct Examination, by Mr. Rehm.

My name is E. M. Flinn. I am the Assistant District Director of Internal Revenue for the St. Louis District. I have held this position since November 18, 1952. From 1942 to 1952 I was a Special Agent in the Intelligence Unit of the Bureau of Internal Revenue (it was stipulated that the witness Flinn was the official custodian of the income tax returns described in Indictment No. 27866). I can identify what has been marked as Government's Exhibit 1-A. It is Treasury Department Form No. 899, Certificate of Assessments and Payments, in the names of Louis and Mary Berra, 3120 Hampton, St. Louis, Missouri, for the period 1951, 1952, and 1953. It is a record of the payments of the assessments and the payments by the defendant and his wife from the first of 1951 until the end of 1953. I can identify what has been marked as Government's Exhibit 1-B. It is a Form 1040, U. S. Individual Income Tax Return for the Calendar Year 1951, in the name of Louis Berra, 3120 Hampton Avenue, St. Louis 9, Missouri. It was filed on March 17, 1952, and received by our office on that day. The names signed to the return are Louis and Mary Berra. I can identify what has been marked as Government's Exhibit No. 1-C. It is a form 1040, U. S. Individual Income Tax Return for the Calendar Year 1952 in the names of Louis and Mary Berra, 3120 Hampton Avenue, St. Louis, Missouri, and it is signed Lou Berra and Mary Berra. It was filed and received by our office on February 25, 1953. I can identify what has been marked Plaintiff's Exhibit No. 1-D. It is a Form 1040, U. S. Individual Income Tax Return for the Calendar Year 1953, in the names of Lou and Mary Berra, 3120 Hampton

Avenue, St. Louis, Missouri, signed Lou Berra and Mary Berra. It was received by our office on March 3, 1954. The foregoing Exhibits, Plaintiff's Exhibits Nos. 1-A, B, C, and D were offered and received in evidence without objection. Going back to Exhibit 1-B, the 1951 return, shows Mr. Berra's gross receipts or gross income to be $6,820.00. The actual tax on this amount was $566.54. The St. Louis Labor Health Institute is the only source of income shown on the return. On Exhibit 1-C, the 1952 return, the sources of income indicated on the return are Union 688, Warehouse Union 688, and Labor Health Institute for a total of $8,245.00. The tax shown as due and owing on Exhibit 1-C is $691.42. The amount of money on the return that is subject to the tax of $691.42 is $3,114.50. On Exhibit 1-B the tax of $566.54 was due and payable on an income of $2,777.22. On Exhibit No. 1-D the only source of income shown is Local Union 688. The tax shown as due and owing on Exhibit 1-D is $775.52. This amount of money is figured on an income of $3,493.34. (Government's Exhibit 1-B is a United States Individual Income Tax Return for the Calendar Year 1951. It is made out in the name of Louis Berra of 3120 Hampton Avenue, St. Louis 9, Missouri. It shows that Louis Berra, the taxpayer, is married to a Mary Berra. It shows three exemptions, one for the taxpayer, Louis Berra, and two for his children, Victor Berra and Charles Berra. The tax return shows an income of $6,820.00 from the St. Louis Labor Health Institute on which a tax was shown as due and owing of $566.54. Under miscellaneous deductions there are deductions in the amount of $1,642.78 reflecting a net income of $5,177.22. Government Exhibit No. 1-C is a United States Individual Income Tax Return for the year 1952. It is made out in the name of Louis and Mary Berra, 3120 Hampton Avenue, St. Louis, Missouri. It shows four exemptions, one for the taxpayer, Louis, one for his wife, Mary, and two for his children, Charles and Victor. It shows an adjusted gross income of $6,695.00 received from three sources, Union 688, Warehouse Union 688, and the St. Louis Labor Health Institute. Under miscellaneous deductions there is taken deductions in the amount of $1,180.50, leaving a net income of $5,514.50. On this amount there is shown a tax due and owing of $691.42. The return is signed by Louis Berra and Mary Berra.

Government's Exhibit 1-C is a United States Individual Income Tax Return for the year 1953. It is in the name of Lou and Mary Berra and signed by these two named persons. It shows three exemptions, one for the taxpayer, Lou, one for his wife, Mary, and one for Charles Berra, son. It shows one source of income, Local Union 688 in the amount of $6,280.00. It shows itemized miscellaneous deductions of $985.66 leaving a net income of $5,293.34 on which the tax is shown as due and owing in the amount of $775.52).

ELMER W. WEBER testified as follows:

Direct Examination, by Mr. Stanard.

My name is Elmer W. Weber; I live at 4496 Maryland; I am employed by Teamsters' Local 688 as House accountant (it was stipulated that the witness Weber was Custodian of the books and records which the Government would introduce). My duties as house accountant of Teamsters' Local 688 are to close the subsidiary registers, making the necessary postings to a general ledger, balance some papers on inventory stock on a monthly basis preparatory to annual audit by a Certified Public Accounting firm. Other than Local 688 I handle the accounts and have the supervision of the accounts of Teamsters' Local 600, 601, 682, 405, the Labor Health Institute, their Building Fund, their drugstore account, St. Louis Joint Council Credit Union, Joint Council No. 13, Teamsters Central State, the Teamsters Missouri and Kansas Conference of Teamsters, and the United Welfare Association. I have been an accountant for the L. H. I. for six and a half years (the St. Louis Labor Health Institute is referred to throughout the trial as the L. H. I.). The Labor Health Institute is a medical center, serving medi .. care and dentistry for all members of Local Union 688. The source of its revenue is a percentage of the payroll of the various employers that are under contract with the Union and the Labor Health Institute and it is supported by employer contributions entirely. I am Custodian of the books and records of the Labor Health Institute because under date of the 23rd of February, 1954, I was served a so-called

"order" by the Grand Jury under the signature of Judge Moore, United States District Judge, giving me the power of entire custody of the Labor Health Institute records. The offices of the Teamsters' Local 688 are located in the same building as the L. H. I. The officers of the L. H. I. are at present, Harold J. Gibbons, President, Richard Kavner, Vice-President, John Nabor, Secretary-Treasurer. Miss Yuki Kato is office manager. The officers of Local 688 are at present William Lytel, President, Ernest Konn, Vice-President, Harold J. Gibbons, Secretary-Treasurer. I know the defendant Louis Berra. I have known him for six and a half years and have worked with him. My business connections with Mr. Berra first started in 1948 when a personal friend of mine had recommended me to Mr. Berra and he hired me in April, 1948. Mr. Berra was the business manager of the L. H. I. and I was the house accountant. I took my instructions from Mr. Berra. We frequently discussed the procedures of the Labor Health Institute which at that time was a union organization. I am acquainted with the business procedures of the Labor Health Institute. Mr. Berra is no longer the business manager of the Labor Health Institute. He held it up until September of 1952. After September of 1952, Mr. Berra was a trustee and board member of the Labor Health Institute. He did not have the title any longer as business manager, but continued to maintain his duties as business manager, even after September, 1952. He carried on the duties of business manager even though he no longer had the title from September of 1952 until May of 1953 and in May of 1953, Miss Yuki Kato was appointed as business manager. At the present time Mr. Berra has no duties for the L. H. I. While Mr. Berra was business manager of the Labor Health Institute, and even after he no longer had that title but was acting as the business manager of the Labor Health Institute, he hired people to work at the Labor Health Institute building. He authorized expenditures for the Labor Health Institute. He continued to do those same sort of things even after he no longer had the title of business manager. I have the custody of the payroll records of the Labor Health Institute for 1951 and 1952, showing the salary and expenditures paid to Lou Berra. They are under my supervision and control. They are records made in the regular course

of business and it is the regular course of business to keep such records. They accurately reflect the transactions as entered therein. I can identify Government's Exhibit No. 2-A. This represents the individual earnings record of Louis Berra. It shows the salary and the expense accounts paid Louis Berra by L. H. I. during 1951. It shows $5,600.00 salary, $1400.00 his expenses, a total of an even $7000.00. I can identify Government's Exhibit No. 2-B. It is the same type of thing, the earnings record of Louis Berra. It shows the gross salary and expense allowances paid to Louis Berra by the L. H. I. during 1952. It shows a salary of $4,985.00, expenses of $1,125.00, or a total of $6,120.00. That did not cover the entire year of 1952, however, the last check being drawn for the week ending September 4, 1952. The gross salary figure I read off was $4,995.00. I am acquainted with the business procedure regularly followed in the business office in the L. H. I. It is in the regular course of business to keep statements and invoices after they have been paid. I am acquainted with the procedure followed in the regular course of business on the paying of statements and invoices. I can identify what has been shown to me as Government's Exhibit No. 2-C. It is a part of the L. H. I. records in my custody, that is the statements of the Melcher-Schene Hardware and Lumber Company, covering purchases by the Labor Health Institute for the month of November, 1951, showing the proper okay and noted with the check number and date that show on the books that it was paid by the L. H. I. The notation which shows the proper okay are the words "O. K., Lou." The other notation is the showing the total amount of the statement which is circled in red pencil, with the following notation "Check No. T-210, 12-7-51." That indicates to me that a check was drawn on the Tower Grove Bank, Check No. 210, dated December 7, 1951, in the amount of $269.18, payable to the Melcher-Schene Hardware and Lumber Company. I can identify the next group of papers which have been marked for identification as Government's Exhibit 2-D. Going back to Government's Exhibit 2-C, I know from my own knowledge that Lou Berra made the notation appearing on it "O. K., Lou." Also I would like to correct my previous testimony that Mr. Berra relinquished all duties as business manager in May

of 1953. Actually it was May of 1954, when he continued no longer to act as business manager of the Labor Health Institute. I was in error. The group of papers which have been shown to me as Government's Exhibit 2-D are invoices of J. Shulman and Sons rendered in duplicate for the period of August 10, 1951, through December 14, 1951. The bills which these invoices represent have been paid. I can tell that they have been paid because the invoices are all individually properly okayed with the proper check number and the date on which they were paid to the vendor by the Labor Health Institute. They are all okayed in the same manner, "O. K., Lou", and that refers to Lou Berra. I can also identify what has been marked as Government Exhibit 2-E. They are invoices of John F. Schmidt for the period January 19, 1951, through December 28, 1951. They were all rendered to the Labor Health Institute. I can also identify what has been marked as Government's Exhibit No. 2-F. They are invoices of John F. Schmidt for the period January 18, 1952, through December 26, 1952, all being billed to Labor Health Institute and properly noted with the check number and date. However, every one of these is not okayed. Some of these invoices have the written okay on them and some do not, but they all were paid by check issued by the Labor Health Institute. I can identify what has been marked as Government's Exhibit No. 2-G. They are invoices of John F. Schmidt for the period January 1, 1953, through October 9, 1953. There are indications on all of those invoices that they have been paid and they all indicate the payment and check number. They were all paid by the Labor Health Institute and each invoice shows that it was an invoice to the Labor Health Institute. Mr. Berra was not on the payroll of the Labor Health Institute in 1953. The last check to him from the Labor Health Institute was September 4, 1952. However, subsequent to September, 1952, Mr. Berra continued to act in regard to authorizations and contracts as he had previously. While Mr. Berra was business manager of the Labor Health Institute prior to 1952 he approved payments, he hired people to do work around the L. H. I. building. He continued these same actions even after he was taken off the payroll of the L. H. I. in September of 1952.

Cross-Examination, by Mr. Hennelly.

Mr. Berra's authority with respect to checks was that he had authority to sign checks. His signature was counter-signed by some other member of the staff. He also had the authority to okay bills as they came in. He had all of this authority not only until September of 1952 but even after that time all through the years 1951, 1952 and 1953. He had this authority together with the requirement of a counter-signature. He had the personal authority to okay the payment of any bills. I have brought with me the minute books for the L. H. I. for the five-year period 1949, 1950, 1951, 1952 and 1953. I can identify these minute books, which have been marked for identification as Defendant's Exhibit A, as the minute books of the Labor Health Institute for this five-year period. Since I received the order making me the custodian of the records of the L. H. I. I also have the custodianship of these minute books. These are records which are kept in the normal course of business at the L. H. I.

EDWARD HERCHERT testified as follows:

Direct Examination, by Mr. Rehm.

My name is Edward Herchert. I am a concrete and cement contractor. I have been engaged in this business for thirty-eight years and I was so engaged during the years 1950, 1951, and 1952. I am acquainted with an organization known as J. Shulman and Sons and I have had business relations with them. In a portion of the years 1951 and 1952 I done their concrete and cement work. J. Shulman and Sons are general contractors. I know the defendant, Mr. Berra. I have met him by working out at his home. To the best of my recollection it was in August of 1951. His home is located in the 3100 block of Hampton Avenue, 3120 is the address, I believe. I was contacted to do this work by Mr. Harry Shulman and later I contacted the firm of J. Shulman and Sons. Mr. Harry Shulman called me out to Mr. Berra's home. The purpose of my visit out there was to measure up some work to be done. It was a public sidewalk on the street side on the

street south of them and also some new blocks in the kitchen tank and to determine how many loads of material would be required for this work at Mr. Berra's home. Mr. Shulman hired me. To the best of my recollection Mr. Shulman did not do any work out there at that time. I did the form work and everything. I laid the foundation. Mr. Shulman had nothing to do with that. I was paid for that work by J. Shulman and Sons. I billed that work to J. Shulman and Sons. They hired me. I can identify what has been marked as Plaintiff's Exhibit No. 3-A. That is one of our invoices to the J. Shulman and Sons for the Berra job at 3120 Hampton. The amount is $412.00. This is my copy that I kept in the regular course of business. It is a copy of the bill that I gave to the J. Shulman and Sons. It has been paid. The work was all performed at Mr. Berra's home and he was present. Yes, that is the gentleman there sitting at the end of the table (indicating Mr. Berra). I can identify what has been marked for identification purposes as Plaintiff's Exhibit No. 3-B. It is a bill for some extra work that was done later on at 3120 Hampton. I know of my own personal knowledge that this work was done at the same place as the prior work. I was present and I performed the work that was done by the Herchert Contracting Co. and I sent the bill to J. Shulman and Sons and I received payment for it from J. Shulman and Sons. I know of my own personal knowledge that the work was done as represented by these two Exhibits. (Government Exhibit No. 3-A is a copy of a bill on the stationery of the Herchert Contracting Co., 721 Olive Street, St. Louis 1, Missouri, dated August 3, 1951, directed to J. Shulman and Sons, 5103 Vernon Avenue, St. Louis, Missouri re: repairs L. Berra, 3120 Hampton. It is a bill in the amount of $412.00. It is headed "To completion of proposal dated July 18, 1951." A breakdown of the bill shows that removing public walk and replacing, $343.00, walk at side entrance excavating only and two risers, $55.00, place of walk at side of building, excavating where ashpit was placed, $14.00, total $412.00. The bill is dated August 3, 1951. Government's Exhibit 3-B is a similar bill of the Herchert Contracting Co., dated November 13, 1951. This bill is directed to J. Shulman and Sons, 5103 Vernon, for work done for L. Berra, 3120 Hampton. The bill shows that the work was done from October 18,

1951, through October 30, 1951. It includes for labor, truck driver, and materials, including sales tax, overhead and profit, a total amount of $542.19.)

JULIA DEIBEL testified as follows:

Direct Examination, by Mr. Rehm.

My name is Julia Deibel; I live at 2502 Belt in the City of St. Louis. I am employed by J. Shulman and Sons. I do general office work. I am bookkeeper and I write letters and so forth. I have been in this position about five years. I was working for the J. Shulman and Sons in this capacity during the year 1951. I kept the books and records and I had acquaintance with them. I take my orders and instructions at J. Shulman and Sons from Mr. J. Shulman and from the boys, Harry and Jack; that is, Harry Shulman, Jack Shulman, Al Shulman and the father, Julius Shulman. Any notations or entries that I make in any books or records of J. Shulman and Sons would be at the direction of one of those gentlemen. I recognize what has been marked as Plaintiff's Exhibit No. 4-A. I have seen this Exhibit before. I first saw it when it came to our office in the mail from Herchert Contracting Company. It is a bill from Herchert Contracting Company for repairs done at Mr. Berra's home on Hampton Avenue. It is in the amount of $412.00. Yes, J. Shulman and Company paid Herchert Contracting Company that amount and J. Shulman and Sons received payment for that amount from the Labor Health Institute, that is the L. H. I. There are notations in my handwriting at the bottom of that bill. This is how I know that J. Shulman and Sons paid the money. I have seen what has been marked as Plaintiff's Exhibit No. 4-B. It is a job cost sheet made out for the Lou Berra job at 3120 Hampton, being for the Herchert Construction Company and it says on that job cost sheet, "August 3, Herchert Contracting Company, $412.00". On Exhibit 4-B the notations are in my handwriting. The ones that say to charge a hundred dollars per week until it is paid off, that is my writing. Yes, that is 40 hours weekly until that $412.00 was paid off. What I meant when I say, charge 40 hours a week is

that I was told to charge this here 40 hours to the Labor Health until it was paid off, $412.00, and that is what I did. One of the boys told me; I don't remember. One of my superiors. All the notations were put on by me. They are entries made in the ordinary course of business. I wrote the whole thing. It was kept as one of our records. I kept it this way so that I would know when the bill was paid off and then after it was paid off I then filed it away. The bill from the Herchert Contracting Company was kept in the records of the J. Shulman and Company. I kept it with the rest of the bills in our file. I can identify what has been marked as Plaintiff's Exhibit No. 4-C. That is a bill we made out to the Labor Health for the work at that particular time, for that week, prior to August 10th. 4-D is the work sheet; it is the detailed weekday record of the hours on this work sheet. It has a relation to Exhibit 4-C. It shows a record of where the different carpenters worked for a particular day, not only for that day but for the whole week. This is for the whole week, and is kept in the regular course of business, and it was from this that I prepared the billing to the L. H. I. The billing to the L. H. I. is Exhibit 4-C. I can identify Exhibits 4-E and 4-F. 4-F is a work sheet for the individual work records for the different jobs and different carpenters from August 10th to August 16th and we used the information on Exhibit 4-F to prepare the bill for the Labor Health Institute for work done prior to August 17th as shown on Exhibit 4-E. Exhibit 4-H is the individual work record from August 17th to 23rd, inclusive, and it shows the jobs where the different carpenters worked. It is our weekly record of where the men worked and it shows exactly how many men worked that week and where they worked. Yes, I can identify Exhibit 4-G. It has a relationship to Exhibit 4-H. We prepared 4-G, the bill to the L. H. I., from Exhibit 4-H. I can identify Exhibit 4-J. It is the weekly work sheet for the week of August 24th to August 30th. Exhibit 4-I is the bill which we sent to the L. H. I. dated August 31, 1951. We made up the bill to the L. H. I. from our weekly work sheet. In other words we made up 4-I from 4-J. I can identify Plaintiff's Exhibit 4-K. It is a bill we got from Herchert Contracting Company for that job at 5120 Hampton Avenue for Lou-Berra. The amount is $542.19. The bill is to J. Shulman and Sons. It has

been paid by J. Shulman and Sons to the Herchert Contracting Company. J. Shulman and Sons has been paid by the Labor Health Institute. I have seen Exhibit 4-L before. It is in my handwriting and all the figures, letters and numbers are mine, made by me in the ordinary course of business. I used it so I could keep track when the $542.19 bill of the Herchert Contracting Company was paid off. It shows that we paid off the Herchert Contracting Company the $542.00. This Exhibit 4-L shows that we charged off the Herchert Contracting Company job at Lou Berra's place at the rate of $108.00 a week to the Labor Health Institute.

At this point, 4:23 p. m., Monday, September 27, 1954, a recess was had until 10:00 a. m., Tuesday, September 28, 1954.

The Court convened at 10:00 a. m. on Tuesday, September 28, 1954, and, the jury being present, the following proceedings were had:

Direct Examination of Miss Julia Deibel resumed.

Yesterday, I had identified Plaintiff's Exhibit No. 4-K as a bill from Herchert Contracting Company to J. Shulman and Sons in the amount of $542.19, dated November 13, 1951, for work done at Mr. Berra's home. Mr. Shulman paid that bill. He paid Mr. Herchert. Mr. Shulman did not bill Mr. Berra. We billed that to the Labor Health Institute at 40 hours a week. There are other markings on that bill beside the regular bill from Herchert. I put down these markings to show each week how much we billed the Labor Health Institute and we billed them 40 hours a week. That comes to $108.00 a week. Yes, the same is true with respect to Government's Exhibit 4-A, which has been previously identified as the bill from Herchert Contracting Company dated August 31, 1951, in the amount of $412.00. The same thing was done with that bill as with the previous bills, which I testified. I can identify Plaintiff's Exhibit No. 4-N. It is our work sheet for the different jobs and the different carpenters that worked at those jobs. It covers the time from November 9 to the 15th, inclusive, in the year 1951. Exhibit 4-N is a duplicate of the bill we sent Labor Health Institute

for this cost sheet. On Exhibit 4-M the hours shown as labor billed to the Labor Health Institute for the period to November 15, 1951, inclusive, labor sixteen hours at $1.77 per hour; a hundred hours of carpentry at $2.70 an hour; and a foreman at 40 hours at $2.95 an hour. On Government's Exhibit 4-M there is a billing to the Labor Health Institute. This billing on Exhibit 4-M is for labor performed during the week of November 9 to November 15th. Exhibit 4-M is our copy of the bill to the Labor Health Institute. The number of hours billed on Exhibit 4-M is the same as that shown on Exhibit 4-N, except that I added forty hours to pay for one of the concrete bills. I added this forty hours to the bill of the L. H. I. at the suggestion of one of the boys from J. Shulman and Sons. I don't remember which one. Exhibit 4-P is a labor sheet for the week of November 16th to the 22nd, inclusive. I used the information on Exhibit 4-P in preparing Exhibit 4-O. 4-O is a bill that I made out to the Labor Health Institute for work done. The number of hours as shown for carpentry labor on Exhibit 4-P, as being done at the L. H. I., is thirty-three hours at $2.95 an hour and forty-nine hours at $2.70. The bill to the Labor Health Institute, that is Exhibit 4-O, shows forty hours more carpentry. From my own personal knowledge I know that the reason this bill calls for forty hours more was to pay off that Herchert Concrete bill. I can identify Plaintiff's Exhibit 4-R. It is a daily work sheet for work done from November 23 to November 28th in 1951. It shows the carpenters who worked on the jobs at various places and at the Labor Health Institute. I used Exhibit 4-R in preparing Plaintiff's Exhibit 4-Q. 4-Q is the duplicate of the bill we billed the Labor Health for work we did that week of November 23 to November 29th. J. Shulman and Sons received payment for that previous week prior to the date of billing. These Exhibits 4-1-S, 4-2-S, 4-3-S, 4-4-S and 4-5-S are the work sheets that Mr. Shulman makes up each morning and I work from these sheets and enter them to this here labor sheet that I make up. They show where the carpenters worked and what carpenters worked at what job. Well, they showed from November 23rd to the 29th. 4-1-S to 4-5-S are daily work sheets, showing who worked in what place. I used these Exhibits 4-1-S to 4-5-S, inclusive, in preparing the information on Government's Exhibit 4-R.

They cover the week, November 23rd to November 28th. They show that work was done during this week at the L. H. I. On November 23rd, 4-1-S shows that Mertens worked eight hours over at the L. H. I. and Beck eight hours and Harry or Al, four hours. This was done at the L. H. I. building at 1127 Pine Street. After this daily sheet was made up there was some hours added on, also the words "Berra's home". Mr. Al Shulman put that there. It shows that though the work was billed to the Labor Health Institute, it was done at Mr. Berra's house. The same goes for Exhibit 4-2-S, which is for November 26th, which shows Merten, eight hours, Beck, eight hours, Harry or Al, four hours. Mr. Shulman put the words "Berra's home" on that, which shows that although the work was billed to the Labor Health Institute it was actually done at Mr. Berra's home. This is also true of Exhibit 4-3-S, which shows that on November 27th Merten worked eight hours, Beck, eight hours, and Harry or Al Shulman, four hours. This work, although it is billed to the L. H. I. at 1127 Pine Street, for work done there, says "Berra's home", which means that it was done at Berra's home. Mr. Al Shulman put that there. The same goes for No. 4-4-S, which is for November 28th, which says that the work there was performed at Berra's home. Also, this is true of 4-5-S, which shows on November 29th Merten, eight hours, Beck, eight hours, Harry or Al Shulman, four hours, for work done on 1127 Pine. This also says "Berra's home" and was put there by Al. Also, I can identify Government's Exhibit No. 4-T. It is a duplicate of the bill we sent the Labor Health Institute on December 7th, which was paid by the Labor Health. Government's Exhibit 4-U shows the number of hours on the regular weekly job sheet. There are forty hours more added on to Government's Exhibit 4-T, which was the bill sent to the L. H. I. than was actually done and reflected in Government's Exhibit 4-U. Yes, I recognize the series of billings which has been marked and identified as Government's Exhibit 2-D. It is a series of billings by J. Shulman and Sons to the Labor Health Institute. All of these bills were paid by the Labor Health Institute. I can identify what has been marked as Government's Exhibit 4-V. That is a duplicate of the bill we sent the Labor Health Institute for the week ending December 14th, 1951. That

bill was paid by the Labor Health Institute. 4-W is the weekly work sheet for the week ending December 13th, 1951. Exhibit 4-V was made from 4-W, except that there are forty hours more added on.

Cross-Examination, by Mr. Hennelly.

I have never seen Mr. Berra prior to these proceedings. The first time I ever saw him was at the trial. He has never been out at our place of business. He's never come around there and told me to carry anything in my books. I have never even talked to him. Mr. Berra never told me to destroy any books in any way. Whatever arrangement was made in these Exhibits, that is the manner and means in which these monies were charged off against the L. H. I., was an arrangement which existed between me and one of the Shulman boys. So far as I know, Mr. Berra had nothing to do with it. I did not write the words "Berra's house" in these Exhibits entitled 4-S. The first time I saw the words "Berra's house" on Exhibits 4-1-S was after the Grand Jury had begun this investigation. Mr. Shulman wrote these words on after I had them. I had filed them away prior to the Grand Jury investigation and I never bothered to look at them any more. I don't know whether or not Mr. Shulman wrote those words on these bills after he had come down here to the government offices or not. When I made the bill that "Berra's home" wasn't on the weekly job sheets, I only took the figures that were put out by the Shulman boys and sent out the bill that way. The first time that I ever knew there was anything done for Mr. Berra on his home or any place else was when these proceedings started. I didn't even know that they were even working there. I have been interviewed twice by some representatives of the Government.

Redirect Examination, by Mr. Rehm.

When I said that I didn't know any work was being done at Mr. Berra's home as the notations indicate, I meant only with respect to the notations on Exhibits 4-1-S through 4-5-S. I knew about the other work that was done by the Herchert Contracting Company. I knew that

the forty hours extra was being put on the L. H. I. bill for work done at Berra's home (Government's Exhibit 4-A is a bill of the Herchert Contracting Company, dated August 3, 1951, addressed to H. Shulman and Sons, 5103 Vernon Avenue, St. Louis, Missouri, showing repairs done for L. Berra at 3120 Hampton. This is the original of Government's Exhibit 3-A, which is the copy introduced in evidence in files of the Herchert Contracting Company. It shows a total due of $412.00. Written on the original of the bill sent to the H. Shulman and Sons Construction Company which is Government's Exhibit 4-A are the words in pencil, "Charge 100 labor each week, amount paid." Then at the lower right hand corner of the bill are written these notations, "8-10 $108.00, 8-17 $108.00, 8-24 $108.00, 8-31 $88.00." This amount is then totaled $412.00. Government's Exhibit 4-B is entitled job cost sheet. It shows that it is for work done for L. Berra, 3120 Hampton. Under the date of the job it shows 8-3 Herchert Contracting Co., total $412.00, and it shows that this is a subcontract in the amount of $412.00. Then in red pencil beneath this there is noted 8-10 forty hours, $108.00, leaving a balance of $304.00. Beneath the $304.00 balance, there is the date 8-17 forty hours, $108,00, which is subtracted from the prior figure of $304.00, showing a balance of $196.00. Beneath that is the date in red pencil 8-24 forty hours, showing an amount of $108.00 deducted from the $196.00, showing a balance of $88.00. Beneath that in red pencil figures is the date 8-31, showing the amount of $88.00 reducing the balance to zero. On this Exhibit is written in pencil, "Charge 100 per week until paid off." Government's Exhibit 4-D is the weekly individual work sheet from August 3 to August 9, 1951. It shows the total work for that week at the Labor Health Institute, 1127 Pine Street, is eighty hours of carpentry work. Government's Exhibit 4-C is a bill rendered by J. Shulman and Sons to the Labor Health Institute on August 10, 1951, for work done to August 9, 1951, exclusive. It shows a bill to the Labor Health Institute for a 120 hours of carpentry work at $2.70 at hour. In other words, Government's Exhibit 4-C shows an additional 40 hours more charge than is reflected on the weekly work sheet of the Shulman Company. Government Exhibit 4-F shows eighty hours at the Labor Health Institute for the

week of August 10 to August 16th. Government Exhibit 4-E, which is a bill to the Labor Health Institute for the same period shows 120 hours. Government Exhibit 4-H which is the work sheet from August 17 to August 23rd shows eighty hours of work at the Labor Health Institute for the week of August 17th to August 23rd. Government's Exhibit 4-G, which is the bill to the Labor Health Institute for the corresponding period shows 120 hours billed to the Labor Health Institute. Government's Exhibit 4-J which is the work sheet for the period of August 24th to August 30th shows 72 hours of carpentry work done at the L. H. I. Government's Exhibit 4-I, which is the bill to the L. H. I. for the corresponding period shows 104½ hours billed to the L. H. I. Government's Exhibit 4-K is the original of the bill of the Herchert Contracting Company addressed to J. Shulman and Sons dated November 13, 1951 for work done for L. Berra, 3120 Hampton, in the amount of $542.19. In ink on this bill is written underneath the amount of $542.19, the figures 11-16-51, $108.00, leaving a balance of $434.19. Then follows 11-22-51, $108.00, leaving a balance of $326.19. From this there follows 11-30-51, $108.00, which is subtracted from the $326.19, leaving a balance of $218.19. To the left hand side of the page then is carried forward the figure $218.19 and from there there is subtracted $108.00 with the annotation to the left 12-6, leaving a balance of $110.19. Beneath that is the figure 12-14 and there is subtracted from the balance of $110.19, $110.00, which leaves a balance of $.19. This figure remains on the bill in ink. There is no further deduction. Government's Exhibit 4-L is a job cost sheet for L. Berra, 3120 Hampton; on the job cost sheet is written in ink Check No. 10237, date 12-17-51, marked paid in full. The original date is 11-13, Herchert Contracting Company, $542.19. By a series of deductions the amount of $108.00, commencing 11-16, 11-22, 11-30, and 12-6 and 12-14, this job cost sheet reflects the reduction of the $542.19 paid to the Herchert Contracting Company by charging off forty hours of work to the Labor Health Institute each week in the amount of $108.00. Similarly, Government's Exhibits 4-M, 4-N, 4-O, 4-P, 4-1-S, 4-2-S, 4-3-S, 4-4-S, 4-5-S, 4-Q, 4-R, 4-T, 4-U, 4-V and 4-W are all amply described in the testimony and in the prior narration. These are all records of the J. Shulman and Sons

Construction Company and they reflect uniformly that the L. H. I. was charged for work actually done at the home of defendant, Louis Berra.)

RUDOLPH H. ZUROWESTE, JR., testified as follows:

Direct Examination, by Mr. Rehm.

My name is Rudolph H. Zuroweste, Jr. I am office manager at Melcher-Schene, located at 4800 Natural Bridge. That is Melcher-Schene Hardware and Lumber Co. I have had this position for 12½ years. I have control and charge of their books and records. Melcher-Schene Hardware and Lumber Company does retail hardware and lumber business. I can identify what has been previously marked as Government's Exhibit No. 2-C. That is a bill from our firm to the Labor Health Institute, dated November 30, 1951. I can identify Government's Exhibits Nos. 5-A and 5-B. One is an original bill and one is a delivery receipt. They are dated November 21, but they were delivered at the house on November 23rd in 1951. This Government Exhibit marked 5-A bears the notation "Delivered to attention of Mr. Berra at 3120 Hampton Avenue." It was receipted for by Mrs. Lou Berra. Exhibits 5-A and 5-B have a relation to Government Exhibit 2-C. Exhibits 5-A and 5-B have a relationship to Exhibit 2-C, in that the first item on 2-C is a billing for Exhibits 5-A and 5-B in the amount of $200.69. This is represented by the invoices of 5-3 and 5-B. Similarly, 5-C and 5-D are represented by the third item on the statement in the amount of $57.92. 5-C and 5-D are an original and copy of a delivery ticket and invoices in the amount of $56.78, which with sales tax equals $57.92, which is the third item billed to the Labor Health Institute by our firm on November 30, 1951. Government Exhibit 5-E is one of our original bills and it is the second item on Government Exhibit 2-C. That is the second item on the bill to the Labor Health Institute. All these invoices were paid. The material covered in the invoices are as follows. The first one covers knotty pine pareling and two by fours, and nails of different sizes. There were also cove molding and quarter-round. Oak—6-inch oak

wall plates, knotty pine paneling, one by twelve and one by eight No. 2 pine, a piece of inside stair rail, forty lineal feet of cove molding, a piece of Scotia, and a piece of Stop. And the other ticket shows two lock sets, two pairs of four and a half by four and half butts, two casement fasteners, two pairs of brass hinges, and two hand rail brackets. I do not know who ordered this merchandise. The only way I would know where it was delivered is that on one of these tickets it shows that it was delivered to Hampton Avenue. The other two were picked up at our place.

Cross-Examination, by Mr. Hennelly.

During the time that I have been with the Melcher-Schene Company, there have been a number of bills to the L. H. I. for materials which Melcher-Schene had sold to the L. H. I. Exhibit 5-D reflects that these materials were picked up at our place of business by Al Schulman. Also, Exhibit 5-E reflects by signature down in the corner that Mr. Al Schulman also picked that up, the material mentioned therein.

JOHN F. SCHMIDT testified as follows:

Direct Examination, by Mr. Stanard.

My name is John F. Schmidt. I live at 416 Alicia in St. Louis County. I have lived there about 9 years. I own my own home. My present occupation is painting. I work for myself. Before that I did artificial insemination for a while, for about four months. Before that I was in the painting business. I am a painting contractor. I have my own business. I have been convicted of a felony. In 1939 I was convicted of unlawful flight, leaving the State to avoid testifying in a trial, and received one day in the custody of the United States Marshal. In that same year, I pleaded guilty to a charge of assault with intent to rob, and received nine months in the City Jail. The assualt was way back in 1933. Yes, I have done work at the Labor Health Institute Building at 1127 Pine Street. I first went down there to work in May, 1949; at that time I worked through a general contractor. I was called in

by J. Shulman and Son. I would submit bills for my work. I worked for about ten months or a year for the L. H. I. through Shulman, who is a general contractor. After I finished the work that I got through Shulman, I was called in to do work for L. H. I. directly. Mr. Berra asked me to come do some work there. While I was working over there at the L. H. I. I saw Harry Shulman. I had a conversation with him. When I was speaking with Harry, Mr. Berra came up during that conversation. While Mr. Berra was present, Harry Shulman and I had a conversation which didn't last very long. I don't believe that Mr. Berra heard any of our conversation. I then had a conversation with Mr. Berra. Mr. Berra said to me, "What did the sheeny want." He was referring to Harry Shulman, and I told him that Harry Shulman had come in to the building; that he had seen the truck outside. He stopped by and come in. He wanted to know if I would cut him in on that work. I said, "No," that our agreement was on the first job that he got me that he was to receive 10 per cent, just the usual agreement, and on the recall job that he was not supposed to get anything. But he tried to get something over there. Mr. Berra then said, "Hell, I can use that money myself." I had no further conversation with Mr. Berra at that particular time. Mr. Berra then later approached me for money. He came up to me and he told me that he needed $200.00. I don't remember just exactly when this was, but it was after we had started. It could have been in 1950, the latter part of 1950. I asked him where I was going to get the $200.00. He said, "Well, we will tax it on the job." He wanted me to charge it to material, and I told him we couldn't charge it to the material due to the fact that the material houses would have a record of all material shipped and sent to certain places. So he said, "Well, tax it on to the labor," which I did. I would tax it in this way. When he wanted me to do that, like that particular time he wanted $200.00, he told me at various times—one time he told me, "Well, tax me a hundred dollars a week." He would say, "Well, tax on fifty dollars a week until that amount was reached." Well, I was paid—at first, my bills were agreed on when the job was complete. I am now talking about the billing to the L. H. I. We would tax it on to these bills for the L. H. I.

by figuring out the amount of hours it would take to consume that amount of money, and I would add the required amount of hours on to the bill. In other words, if I were making a fifty dollar payment, I would put down the number of hours that would equal fifty dollars and then add on the amount of hours and submit these bills to the L. H. I. Later on Lou told me that he didn't want these big bills all at once; that he wanted to bill every week; so I billed to the Labor Health Institute every week, and when this amount, whatever the amount was that Mr. Berra had wanted, when it reached that amount and I got my money, then I took and gave him a check for that amount. I gave him the checks personally and this arrangement continued for some time. These amounts that Mr. Berra wanted had no connection with handling that work that I was doing. During 1951, 1952, and 1953, I got every bit of my work through Mr. Berra. I paid Mr. Berra the money when he asked for it because every time that Mr. Berra wanted money it just indicated that he would have that much work over there, because I didn't pay him until I received the money and I gave it to him. I kept a record of these payoffs to Berra. I kept a daily work sheet, which indicated the amount of men that worked on the job, the hours that they worked, and the total hours that they worked for that week, and on the opposite side was material, lines that is, and when Mr. Berra got some of it, if it was the first fifty dollars toward that, or a hundred dollars toward that, I would enter that in another column. At the end of the week, I would total that all up and make bills to the Labor Health Institute. I made practically all these payments to Berra on my installment work and I would render bills to the L. H. I. weekly. Yes, I did put something on the bills that I sent to the L. H. I., which indicated something about my payments to Berra. I numbered the bills in my name. I would number them like in the file there, where you can look and see them, of maybe fifty or a hundred dollars a week totals. I would number them and Mr. Berra knew they were in there. I can show something in connection with these numbers that I have told the jury about on Government Exhibits 2-E, F, and G. I can look through these Exhibits and I can find cases in which there is a number shown up in the name as I have

described. Here is one, August 16, 1951. It is typewritten there, No. 1, by my name. The amount is $582.25. That figure No. 1 really means that that was what he has charged for one payment on the amount that he wanted. Yes, I have another invoice with a different number. Here is an invoice numbered "2." The total bill is $388.30, dated August 24, 1951. There is a "2" beside my name. That indicates that this is the second amount that I was holding out for Mr. Berra. No. 3 was August 30, 1951, the amount $730.35; and here is one on September 6, 1951, No. 4, $492.75. There are other Exhibits, a part of Exhibit 2-E, in which there are these numbers. They are September 13, 1951, September 20, October 4, October 11, October 18, October 25, and November 1. And each of the invoices that apply to the dates that I have just read has one of these numbers that I just referred to, and each of these invoices contained a fictitious charge. I can look at Government's Exhibit No. 2-F, which are my invoices for the year 1952. Some of these also contain numbers that I have referred to. January 31, 1952, November 21, 1952, November 28, 1952, December 5, 1952, December 12, 1952; that is all in 2-F. I can look into Government's Exhibit 2-G, which is a collection of some invoices for the year 1953, and I can give you the dates of the invoices which have numbers. They are February 13, 1953, February 20, 1953, February 27, 1953, and May 15, 1953. That is all in Government's Exhibit 2-G. Some of these invoices have numbers up in my name and some do not. The reason for this is that at first when I was paying that to Mr. Berra, we didn't put anything on them. Afterwards he told me—we was talking, and he says, "How many payments is this? How many payments is that?" And he wanted me to mark them in some way so he would know how many more payments he had coming on that certain amount. So therefore I marked and he knew the marks were there. I always did that after he spoke to me on that. From then on I marked them. These marks indicate that a certain amount was charged to Labor Health, which Lou Berra had received. It didn't mean any specific amount. The amounts varied. Sometimes they were a hundred dollars and sometimes they were fifty dollars. He would tell me how much to charge and, if I were going to raise this money from the

L. H. I. in only one or two fictitious billings, I would not bother to put the figures on. I paid Mr. Berra by check. I gave him the checks personally. I put them in an envelope and gave it to him. The checks were made payable at first to Louis Berra, and then after that, Mr. Berra told me that he didn't want any checks, he wanted cash. He said that he thought there might be some kind of a trip-up, and he didn't want to be caught in it. Yes, I kept my check stubs and cancelled checks that I got from the bank. I kept them because those were my records that I had and I even discussed with Mr. Berra the fact that I had to keep certain records for tax purposes. He said at the end of the year there, when I told Mr. Berra, I says, "What am I going to do on this payoff here with these taxes?" I says, "I can't absorb that," I said, I am going to deduct that from my taxes." He said, "All right, you report them" —he will insure my cost to tax. I made payments of the type I have described to Mr. Berra in 1951. I don't remember offhand how much I paid him. The usual procedure I go through each year in connection with making up my Federal income tax return is to call on whatever different business houses I did business with, and ask them what my account had run for that year and they tell me, and I kept notations and kept a record of that, and made notations from the business houses. Other sources for information like that are my bills, and I have my regular work sheet that I have to have for my salaries paid for the year. My regular work sheets show what my expenditures were, where the material was used and the amount that was used. I also used my check stubs and my cancelled checks, and when I made up this work sheet, I have all my expenditures, my labor hours and my material and truck expenses and they are all down on the sheet. Also, I listed Mr. Berra, the amount that I paid him in 1951. Yes, I can identify Plaintiff's Exhibit No. 6-A. This is one of the sheets that I gave to Mr. Troxler for my income tax. This is a sheet that was used in connection with my income tax for 1951. This work sheet shows the total amount taken in from the Labor Health Institute in 1951. There is a notation there in connection with Mr. Berra. It is a notation which I made myself. It shows that I gave Mr. Berra Two Thousand Dollars in 1951. I

took this information off my check stubs and off the daily work sheets. There is also underneath there sixty dollars for baseball suits (Plaintiff's Exhibit 6-A is a work sheet used in connection with the preparation of witness Schmidt's 1951 tax return. In the upper left-hand corner there is the heading "Took in 1951." Below that are two figures, $10,387.64, then a space of a half an inch and to the right of that are the figures, $8,387.64. There is listed on this work sheet what appears to be certain expense items used to deduct from gross income on Mr. Schmidt's tax return to determine his net profit. These are listed as Cook Paint Company, $233.96, Broad-Dugan, $1,347.53, Wages, $4,505.00, Louis Berra, $2,000.00, Louis Berra 2 baseball suits, $60.00, L. H. I. for add, $62.50, Unity Welfare, $25.00, Union dues, $60.00, Total, $8,293.99. There is also listed below that certain other items such as social security taxes, insurance, truck expense, gas and oil, tires, repairs, depreciation, insurance and license, coming to $655.09. To the far left of the work sheet then there is listed as gross $10,387.64, a deduction of $8,293.99, leaving a balance of $2,093.65, from which is subtracted $655.09, leaving $1,438.56 as net income from painting.)

Government's Exhibit 6-B is a check of February 1, 1952, made out to Louis Berra for Four Hundred Dollars. I drew that check. It has been charged to my account. The date of the check is February 1, 1952. Government's Exhibit 6-C is a check of February 18, 1952, payable to Louis Berra, in the amount of $350.00. That check, like the previous one, is also drawn on the Mound City Trust Company and was charged to my account. Government's Exhibit 6-D is dated February 29, 1952. It is a check to Louis Berra in the amount of two hundred dollars, drawn on my account at the Mound City Trust Company. I handed each of these three checks personally to Mr. Berra. Government's Exhibit 6-E is dated March 25, 1952. It also is a check to Louis Berra, in the amount of Two Hundred Dollars, drawn on my account and charged to my account. Government's Exhibit 6-F is dated April 10, 1952. It is a check drawn on my account, payable to Louis Berra, in the amount of $319.30. All of these checks have been charged to my account. They were all handed personally to Mr. Berra by me. Government's Exhibit 6-G is a check dated November 14, 1952 made out to cash, in

the amount of Three Hundred Dollars. It was drawn on my account and charged to my account at the Mound City Trust Company. On the back of the check is an endorsement, Dorothy Rohr. I handed this check to Lou Berra personally. I gave it to him and he gave it to the girl in the union office to cash. I don't know the girl's name. I believe that is her name on the back. I believe she took it to the bank and she endorsed it. Government's Exhibit 6-H is a check dated December 12, 1952, payable to Louis Berra, in the amount of Four Hundred Dollars, drawn on my account and charged to my account at the Mound City Trust Company. Government's Exhibit 6-I is a check dated December 24, 1952, payable to Louis Berra in the amount of One Hundred Dollars, drawn on my account. Government's Exhibit 6-J is a check dated April 7, 1953, payable to Louis Berra, in the amount of Four Hundred Dollars. It is my check. Government's Exhibit 6-K is my check dated April 20, 1953, made out to cash for One Hundred Dollars, and on the back it is endorsed by Warehouse and Distribution Workers Local 688. I gave that check to Mr. Berra personally. Government's Exhibit 6-L is a check made out to cash in the amount of Two Hundred Dollars. It is my check. It is dated May 15, 1953, and on the back it is endorsed Warehouse and Distribution Workers Local 688. I gave it to Mr. Berra personally. Government's Exhibit 6-M is a check, my check, dated June 19, 1953, made out to cash, in the amount of Two Hundred Dollars, and on the back it is endorsed Warehouse and Distribution Workers Local 688. I gave this check to Mr. Berra personally, and all the checks that I have mentioned have been charged to my account. I did some work for Mr. Berra on his home, also, on Hampton. I painted the outside, I believe twice; I went back and did some touching up several times, and I painted the inside, and I also painted the basement. I canvassed up two rooms one time and canvassed the kitchen and painted it another time. I laid rubber tile in his kitchen hall and one room. I don't have any records showing what that work was worth. Mr. Berra had asked me to destroy the records. I don't have any of them. My best estimate is that the work that I did over at Lou Berra's house was worth in the neighborhood of twenty-five hundred or three thousand dollars. I did this work over the

period that I worked at the Labor Health, that would be during 1951, 1952 and 1953. Mr. Berra did not pay me for any of this work. The only way that I was paid for it was by the L. H. I., which gave me my check. I was told by Mr. Berra to charge this work to the Labor Health Institute, and I did charge it. I would charge it in this way. Sometimes we would have three men down at the L. H. I., two of them would be pulled off and be for Mr. Berra's house, and one of them would stay down there at the L. H. I., and then I would bill all three to the L. H. I. At the time they were making their investigations over there at the L. H. I., Mr. Berra called me and asked me to make out a couple of bills for him, one for the inside of the house and one for the outside, which I did. I couldn't make these bills from my records. The records had been destroyed, so I made out the bills, I just took the dates and the amounts at random. I asked Lou what amount to put in. He didn't say so I just put down the only figure that came to my mind on each bill and gave that to Mr. Berra to use. I just made the two bills up out of my head and I marked them paid. Mr. Berra never paid me a cent on them. They were completely fictitious bills. The entire amount had been paid by the L. H. I. without them knowing what they were paying for. I did this for the same reason that I gave Berra the money.

Q. Now, Mr. Schmidt, you have testified that the Defendant Berra asked you to destroy certain records. Did he ever, or can you fix in your mind the time when these efforts increased, if they ever did?

A. Well, he was constantly after me to ask me why I kept that daily work sheet, and I told him I kept that for my records. He constantly told me to get rid of them or, oh, I remember very closely after Mr. Berra was arrested, why he called me up, and that was on George Washington's Birthday, the 22nd of February.

Q. Now, will you tell the jury what the conversation was with Mr. Berra on George Washington's Birthday?

A. He called me up and asked me——

The Court: Just a moment. Before you go further, we will take the morning recess, right here. Announce a ten-minute recess.

(11:17 a. m. Recess ten minutes.)

The Court: This witness was asked to describe a conversation on the 22nd of February, is that correct?

A. That is right.

The Court: What year?

A. This year.

Q. I believe you testified that on Washington's Birthday, February 22, this year, 1954, the Defendant Lou Berra called you up; is that correct?

A. That is right. That is right.

The Court: Just a moment. I understood you to say it was after the defendant had been arrested. Did you say that? A. No. No. I did say it, but that is not correct.

(Mr. Stanard and Mr. Hennelly confer with the Court, off the record and out of the hearing of the jury.)

The Court: You better clear that up before you get through your case, because that doesn't correspond with the indictment. It is very material.

(Further discussion.)

The Court: Proceed.

Q. Mr. Schmidt, you have mentioned, I believe, before the recess, something about the defendant's arrest, that has nothing to do with this case, or with this indictment at all? A. None whatsoever.

Mr. Hennelly: I am going to object to that, ask it be stricken and that the jury be instructed to disregard it, and that a mistrial be declared.

The Court: Overruled. Go ahead. Proceed. Proceed with your examination of the witness.

On this 22nd day of February, Mr. Berra called me on the telephone. He wanted to know if I had destroyed my records, because he told me he was afraid there would be an investigation, and as long as they never had any evidence, why, there wouldn't be any trouble. He told me to destroy my daily work records from Labor Health Institute. I told him I had never destroyed them yet, and he said "Damn it, why preserve them?" I told Mr. Berra that I had to keep these records for my income tax purposes and he told me, he says, "You can take the totals of

what you made down here," and I talked to him in regards to my being trapped up on my income tax. "Well," he says, "That is all right, leave it go for your income tax." He said, "that is all right, leave it go on your income tax." He explained what he meant by "leave it go on my income tax." He wanted to charge it on my income tax. I said, "Well, then I would be charged with making out a false income tax return." He said, "That is all right, leave it go like that." Leave this go as a loan that he had borrowed that money off of me. He told me to say that. He told me to say it in case there was an investigation and I was called before the Grand Jury, I should say it was a loan. I told him it would be hard to make a loan, unless I would be given collateral, and I said if he had paid that loan, the Grand Jury would want a receipt, and I said there was no paper involved. He told me to destroy the records and I told him I would destroy them. He called me up the following morning again and asked me if I had destroyed the records, and I told him no, I didn't have time, I was too busy. He said, "Well, hurry and destroy them." But I didn't do it then. He called me, I think it was the first time was on Monday, the next time was on Tuesday, and the next time was on a Wednesday. On Wednesday, I was sitting in my office, making out some papers, and the telephone rang; I answered it and Mr. Berra was on the phone and he asked if I had destroyed those records and I said, "No, I haven't yet, but I am right here at the desk, I will take care of them now." He said, "Well,"—I didn't hide them or nothing—he said, "Get rid of them." I says, "Okay, I will do it." So I took them and all out of the—took my check stubs, my cancelled checks, then I thought I had all of them, and my daily work sheets, and I burned them in the backyard in a 50-gallon drum we use for burning papers. I did save some cancelled checks that I had for the years 1952 and 1953. But I destroyed the rest of them. That was on a Wednesday. That was on February 24, 1954. He called me up the following Tuesday morning. No, he called me up Thursday morning. He asked me if I had destroyed the checks and I told him yes. He said, "Well, stick to that story that that was a loan, that I paid you back in cash in case you go down before the Grand Jury." And I believe it was that day that he mentioned that he was

before the boys. By boys he meant the Grand Jury. After this conversation on the morning of Thursday, the 25th, I went over to his house sometime later. On that particular morning that he spoke to me he wanted me to come over to his house. I told him that I couldn't come over there on account of my being out on artificial insemination. I had to wait until 9:00 o'clock until the calls were all in and then I would go. So he says, "When can you come over?" I says, "I can't tell you exactly. Some day that I ain't busy." So the following Sunday, I had two calls to make. I called Mr. Berra and told him that I would come over, which I did. I went to his house around noon on Sunday, that is the Sunday following George Washington's Birthday of this year. I went in the back way and I met Mr. Berra and Mrs. Berra at the back door. Well, Mr. Berra says, "Come on, go down in the basement." So him and I went in the basement, and he and I was talking in regards to those records and the happenings. He asked me down there in the basement if I destroyed the records. He wanted me down there for the sole purpose to get away from his wife, because she was kind of nervous and worried. We talked down there for a while, and then came upstairs and we went out. We started to go out the front way and Mrs. Berra was sitting there. She looked very worried. That was all the conversation with Mr. Berra at that time. Yes, I have met Revenue Agents Brown and Shearer. I came down here to the Federal Building the 18th day of March to pay my taxes, and I left from here and went over to the Post Dispatch and paid for an ad., and I stopped in at the Labor Health to pick up some drugs. I went back to Mr. Berra's office to see him, and when I got back there, Mr. Shearer and that other man, Mr. Brown, were in there, and Mr. Berra was there, and he introduced me to those two men, and I believe I told him I didn't know nothing about what happened. I just came to the Federal Building. When he introduced me to them he said they were investigators, and that was the 18th of March in this year, 1954. He told me over there that they were investigating the Union for Uncle Sam. That they were Internal Revenue men (it was stipulated that the defendant knew that Agents Brown and Shearer were investigating on behalf of the Grand Jury his income tax returns). About a week

or so later, I saw Agents Shearer and Brown again. They came out to my house. In fact, they came out there and I wasn't home during the day and the wife told them that I would be back in the evening. I saw them that evening. That was about a week after the 18th of March in this year. At that particular time, they came out and got all of my statements that was made out to the Labor Health Institute. After the agents left that day, I called Mr. Berra on he telephone and I told him that those men were out at my house, and he asked me who, and I told him the same two that were down at his office. Mr. Berra had told me to call him if any agents came out there. He told me if I heard anything or anyone came to my house, that I should call him and let him know immediately, which I did. He asked me what they had gotten, and I told him. I don't remember just when he called me after that, but he called me quite often. Now, after this time when Shearer and Brown came out and obtained all of the L. H. I. invoices, they came to my house again. They came out about two and a half to three weeks later, and they wanted all my cancelled checks, and I had some checks there, and I took them out, and Mr. Shearer and Mr. Brown took them out on the table and went through them in a hurry; and he came back to me and he said, "Well, I am going to shoot straight with you." They showed me a slip of paper but they didn't take any records of mine with them at that time. Now this, I believe, was about three weeks after this prior time, which was about a week after the 18th of March. This is about a month after the 18th of March, around the middle of April of this year. After this visit, I called Mr. Berra again. I told him that Mr. Shearer and Mr. Brown was back out at the house again and wanted those records. I told him that they had come out after those cancelled checks. I told Mr. Berra that they had a list of cancelled checks that Mr. Berra had received and they told me that they didn't want any of the checks I had showed them. They wanted the checks that they had on that paper, which showed the date, who they was made out to, and the amount. He told me to stick to my story and say it was a loan, which I had told the agents it was—I believe there was a few checks, then I had told about Mr. Berra, that I had loaned money to him unbeknownst to my wife. All of this was not true,

the story about the loan to him. I never lent Mr. Berra a cent of money. After I told him about this last trip and what the agents wanted, he just told me that everything would be all right if I stuck to my story, that that was a loan. And he told me that if I came before the Grand Jury and I stuck to the story that it was a loan, why they couldn't do anything, he would be in the clear and so would I. There was no other conversation with Mr. Berra at this particular time. It was a few days later that I got in touch with Mr. Troxler. Mr. Troxler came over to my house and I was able to find some checks. They were in my income tax folder. They were the checks that I have already identified here today, that is Government's Exhibits 6-B through 6-N. They were the checks that I delivered personally to Mr. Berra and they were the payments that I have described. Each of those checks was as the result of Mr. Berra having asked me for money, and I billed to the L. H. I. I had forgotten that they were there, otherwise they would have probably been destroyed with the rest of them. Now, the next day Mr. Berra called me on the telephone. I told Mr. Berra, I says, "Lou, don't you think it would be better for us to tell the truth about this whole thing?" And he said, "No. Stick to your story that it was a loan." He said that I was supposed to tell this story if I was down before the Grand Jury and that is what I should tell them. I dont remember any other conversation at this particular time. On that same evening I came down to the Federal Building. I got down here about 6:00 and I got home around twenty minutes to twelve. There was a message for me to call Mr. Berra, and I called him. I called Mr. Berra and he answered the phone and when he knew who it was he says, "Wait, stay where you are at. I will call you from an outside phone. May have this one tapped." That is, they may have this one tapped. So I stayed at the phone and he called me about five or ten minutes later. I told him, I said, "Lou, those folks down there have more information than what you and I think they have got." He says, "No, as long as you don't tell them anything, you stick to your story it was a loan, they won't be able to do nothing." He said I was supposed to tell that story before the Grand Jury. Later on I did appear before the Grand Jury under subpoena. I was subpoenaed to bring in records, and I

brought in everything I had—my income tax and all. When I got home that night that I was referring to, I called Mr. Berra and told him that I was down there. He said, "Yes, I know you were down there." "What did you tell them." So I told him what I had said down here. He says, "Why didn't you stick to your story and tell them that it was a loan?" I said, "No, Lou, they have got more evidence than what you think they have got." And that night that I called him up was the night that I had been in the office of the United States Attorney. I had not yet been before the Grand Jury, although I later did appear. That same night, earlier in the evening, when I had been at the United States District Attorney's Office, they asked me these same questions.

Cross-Examination, by Mr. Hennelly.

When I first started the job down at the L. H. I. I was a subcontractor and Mr. Shulman was the general contractor. I had the contract with Harry. I was called back on the job by Mr. Berra. That was in 1950, or it could have been in the latter part of 1949. At that time when I was called back, I would say I'd been working down there for about ten months or a year. It was either late 1949 or early 1950 when Mr. Berra came in and he said, "What did the sheeny want?" Right while Mr. Harry Shulman was standing there. He heard him. I was painting that day. I had a couple of men working for me. We were directly in the lobby where the front door is. There were other people going back and forth all the time, and it was right there that I had this arrangement with Mr. Shulman, whereby I was to pay him some money on a percentage of jobs that he called me. I was supposed to give him 10 per cent of the gross cost of the job, and I always paid him that money. I had that taken off my income tax for the different years I paid for. While Shulman and I was talking there, Mr. Berra walked up and then that conversation ceased, and then Mr. Berra and Harry Shulman greeted one another, and then Harry left, and Mr. Berra told me, "What the hell did that Sheeny want?" And then I up and told him that he had saw my truck and he had stopped in there and wanted me to cut him in for ten per cent of the job, and I told him no, that our agreement

was that on the first time he called me on the job he was supposed to get ten per cent but not on the repeat paint job, and he got that ten per cent. All the figures that are on this work sheet, Government's Exhibit 6-A, are not mine. The typewritten figures are mine. I didn't put anything on there except the typewritten section. My income for the year 1951 was $10,387.64. It was made up of all the invoices which had been paid of the money I had received from the L. H. I. for that year. This work sheet properly reflects the amount of money which I earned for the year 1951, and includes all of the money which I received from the L. H. I. I was on a cash basis. I made a record of the money I received from the L. H. I. Defendant's Exhibit B is a check from the L. H. I. drawn on the Security National Bank in the amount of $1160.60, dated February 9, 1951, payable to me. Yes, it is a check for 1951. It could be possible that it is included in the $10,387.64. There are twenty-one invoices that I rendered to the L. H. I. in 1951. The first invoice is in the amount of $211.76. The second invoice is in the amount of $466.10. The third invoice is in the amount of $72.53. The next one is $505.76. The next one is $382.67. The next one is $425.96. The next one $532.28. The next one $582.25. The next one is for $388.30. The next one is for $730.35. The next one for $492.75. The next one $547.29. The next one, $418.09. The next one is $829.36. Also $673.77, $705.65, $838.21, $676.00, $356.59 and $623.90. There is also one for $225.66, but this was not paid until January 4, 1952. When we take a tape and total up all these invoices which were paid during 1951, the total is $10,387.64. This is the total that I have on my work sheet.

Q. Now, that is the total that you have on your work sheet, isn't it? A. That is right.

Q. That total did not include the $1,160.60, which the L. H. I. paid you in different check than the others, did it, sir? A. Now, what was this?

Q. I say, that total did not include this check though, did it?

(Defendant's Ex. B, a check to Schmidt dated February 9, 1951.)

A. It didn't include that check?

Q. You look and see if you find it on the tape any place.

(The witness examines the tape.)

A. Well, I have got all checks, these stubs from L. H. I. on the checks that they had paid me, so I have those yet, every one of them, and I can bring them down here as proof to show what they paid me. Now, whether this was a payment for a whole job or whether it was in on your weekly tickets.

Q. Now, Mr. Schmidt, if you were paid, if you received this check on February 9, 1951, you would have included it in your tax for that year, wouldn't you, sir? A. Yes.

Q. And I believe you have indicated that that figure shows all of the work that was done?

A. This figure here (indicating)?

Q. Yes. The ten thousand. A. Yes.

Q. But it doesn't include this, does it, sir, the $1,160.00?

A. Well, I can't tell by this here. This is a total of that year made at Labor Health in 1951 and the total income was $10,387.64. I can't tell whether that check is in here or not.

Q. All right.

A. This is my total; my record was destroyed.

Q. Now then, I will ask you if you did any work for any one other than L. H. I. that year?

A. Well, offhand, I couldn't tell you, no. I don't know.

Q. Well, I will ask you if you remember doing some work for Mr. Pete Sappho (Phonetic).

A. Yes, I did some work for Mr. Pete Sappho.

Q. Did you do that work in 1951? A. I did.

Q. Did he pay you for it? A. Yes.

Q. Did you include that in your income tax for 1951?

A. It is on my income tax.

Q. Is that included, then, sir, in this $10,387.00 also?

A. Well, now, there is other figures on here besides my income at Labor Health. It was my income turned in at that time for $10,387.00. I don't know. I don't have my income tax papers. They have got all my papers, all my records.

Q. I am asking you, sir—you prepared something in connection with that $10,387.00, didn't you?

A. That was what I put in up here (indicating). Now I notice down here you will see my wife, I had a nurse. Here is what she deducted for herself.

Q. Uh-huh.

A. I don't understand this. You would have to talk to Mr. Troxler or my wife—they could tell you that, yes.

Q. Well, you made up that yourself, that ten thousand dollar figure, thought, didn't you?

A. That is right. I made up that ten thousand dollar figure.

Q. And did you in writing that put down all the money then that you took in? A. Yes.

Q. Now, all those invoices amounted to actually $10,387.64, didn't they? A. Yes.

Q. And they did not include that eleven hundred, did they?

A. I told you before, I don't know about that eleven hundred. I can show you all my stubs that I have just like that from Labor Health Institute. I have everything at home.

Q. Mr. Schmidt, the reason you destroyed your books and records in this case, isn't it, is because you made a fraudulent tax return for the year 1951?

A. No, siree. No, sir. I just destroyed them when Mr. Berra called me and told me to destroy them.

Q. All right, did you do any painting for any one other than Pete Sappho that year?

A. I don't remember offhand who I painted for. No.

Q. Well, did you do a lot of painting other than the work done at the L. H. I. building? A. In 1951?

Q. Yes.

A. I don't remember. It could have been maybe that I painted for Mr. Cupples in 1951.

Q. Mr. Cupples. A. Yes.

Q. How much work there did you do? A. I don't know.

Q. Have you any idea of the amount that was involved?

A. No, I don't. I say I may have did some for him in 1951; I am not sure.

Q. You painted for .....

A. That job was painted for—the cost of labor and material, because he was a friend of Pete Sappho's and the man never had any money, and while we was at Pete Sappho's painting his father's house, that wasn't Pete Sappho's house, that was his father's house, and we went over, when we had the ladders and material then and went over and painted this man's house, which took about a day's work, and he paid for the cost and that was all.

Q. Did you include either of those jobs or the Cupples job? A. I wouldn't say the Cupples job was on there.

Q. Well, did you include any of those on your income tax return for 1951?

A. If the job was done for cost, I am not including that, no.

Q. You didn't include it? A. No.

Q. Now, the records from which you made up this sheet, that included all of the income that you got in 1951?

A. It is listed on there.

Q. Well, isn't that the work record that you used?

A. It is listed right in that sheet.

Q. Didn't that include also the work hours of the men, sir? A. It is on here, for work that was paid out.

Q. I mean aren't those the records from which you made this work sheet? A. Yes, sure.

Q. Those were the records that you destroyed, weren't they, sir?

A. My work sheets? No, I have got my man-hour sheets, I have got all those.

Q. You have got all of them for 19——

A. The only thing that I destroyed was the records from Labor Health Institute, I mean my daily work sheets on that, but I have my work sheet for the man hours.

Q. For 1951? A. That is right.

Q. For 1952? A. That is right.

Q. Now, then, with respect to the arrangement whereby you were to pay him the money, if I understood you correctly, sir, you made an arrangement whereby you would —that he would tell you how much money he wanted and then you would take down the amount by adding it to the separate bills; and after you got that money, would you then give him the amount that he wanted?

A. I gave him the amount of money.

Q. All right. I am going to show you what has already been marked in evidence as United States Exhibit 2-E. I am going to ask you, sir, to refer to the invoice marked August 16.

(The witness examines the said document.)

A. August 16, 1951. $582.25.

Q. Now, then, what is the number on the next invoice, your code number, sir? A. No. 2.

Q. And what date is that invoice? A. August 24, 1951.
Q. And the third? A. August 30, 1951.
Q. And the fourth? A. September 6th.
Q. 1951?
A. That is right. These are all '51s, aren't they?
Q. That is right. And the fifth? A. September 13.
Q. 1951? A. Uh-huh.
Q. Now, that is number five, that is marked here, isn't that right? A. Yes, that is a "5" there.
Q. So that under your arrangement, you didn't pad those accounts sufficiently to get your money back until September 13, 1951, is that right? A. (Indistinct).

Mr. Rehm: He said "Yes."

Q. Now, as a matter of fact, the first check that you gave him was on August 20, 1951, wasn't it?
A. August 20?
Q. Uh-huh.
A. No, we never got no check August 20th, according to this.
Q. You mean if the method that you have detailed is true, he could not have got it on the 20th, under that?
A. This first bill here is August 16, has got No. 1 here.
Q. That is right. A. August 24——
Q. No. 2? A. Got No. 2.
August 30 has got No. 3.
September 4—or September 6 has got No. 4, and September 13 has got No. 5.
He got his payment—I make my statements out—made them out on Thursday evening, gave them to him on a Friday morning.
Q. Is it your testimony, sir, that you did not give him money by check on the 20th of August, 1951, in the amount of $650.00?
A. 20th of August, he could have had another check.
Q. Sir?
A. He could have had another check; other than what these billings are.
Q. Well, that one, two, three, four, five, wouldn't that have been the last?
A. According to this, he would have got that on the last payment.
Q. When would that have been?

A. That would have been September 13th.

Q. That would have been September 13?

A. He would have got it on the 14th.

Q. He would have got it on the 14th? A. Yes, sir.

Q. So that if he got it on the 20th, if he got that check on the 20th, I mean the $650.00, the rule just doesn't apply then, would it, sir? A. Why don't it?

Q. Well, the reason that it didn't, isn't it, sir, is because you loaned him a little money and made up later—after you loaned him $650.00, that the way that you would get it back would be by padding these personal-padding accounts and in successive invoices?

A. I never loaned Mr. Berra a cent, to tell you the truth.

Q. You never loaned him any money?

A. I never loaned Mr. Berra a cent of money, no.

Q. Very well. Let me have those back bills. I am going to ask you, sir, if you recall, sometime in the first part of November, as a result of these loans that were made——

Mr. Rhem: Your Honor, there is no evidence whatsoever that there were loans.

Mr. Hennelly: I will rephrase it, your Honor, I will rephrase that question.

Q. As a result of those payments, I am going to ask you if you recall Mr. Berra giving you six $100 bills—$600.00.

A. Give me six $100 bills?

Q. Yes, sir. Or $600.00 in any denomination, in the early part of November or the latter part of October?

A. No. I don't remember that.

The Court: What year?

Mr. Rhem: 1951.

The Witness: I don't remember anything like that.

Q. I am going to ask you if it is not a fact that you took that $600.00 in cash and deposited it to your account over at the Mound City Trust Company?

A. I don't remember any $600.00, no.

Q. Is it possible that he gave you the $600.00, that you forgot about it?

A. No, not that I can think of. I don't remember of him giving me $600.00 in money. If he did, it has slipped my mind.

Q. If he did, it was to repay this loan then, wasn't it, sir?

A. I am telling you now, Mr. Berra never did make a loan from me.

Q. Oh, you say—I am sorry. Are you finished with your answer? A. Yes, I am.

Q. All right. But would you say now that it is possible that he gave you $600.00?

A. I don't know. You are the one that is saying it. You should know if you got it down here. I don't remember anything, Mr. Berra giving me any money.

Q. Well, is it possible he gave it to you and you forgot about it? A. I wouldn't say yes and I wouldn't say no.

Q. All right. Do you have any recollection of him making a payment to you around the 5th day of November, 1952, in the amount of $250.00? A. No, I don't.

Q. Is it possible that he gave you that amount, sir?

A. I wouldn't say it was possible.

Q. Well, would you say that it could have happened and you don't remember? A. I don't know.

Q. You don't know? A. I wouldn't say it was possible.

Q. I am going to ask you if he could have paid you back $100 on the 4th day of June, 1953? A. No.

Q. Is it possible that he did it and you forgot about it?

A. I don't see what he would want to pay me that money for.

Q. Well, do you remember now, sir? A. No, I don't.

Q. Incidentally, would you say that your memory is at this time a little bit bad?

A. I don't see why it should be.

Q. Well, didn't you just testify under oath that your memory was bad, sir? A. Did I testify under oath?

Q. Do you recall your deposition being taken in a civil suit, when you were asked about your memory and you said that your memory was bad?

A. My memory was bad maybe at that particular time on certain things, but my memory is pretty good right now.

Q. Is it? A. It is.

The Court: Announce a recess until 2:00 p. m.

At this point, 12:30 p. m., September 28, 1954, a recess was had until 2:00 o'clock p. m.

The Court: Admitted by the defendant that the salary in Exhibits 1-C and D offered by the Government were income tax returns for the years 1951, 1952 and 1953; that it had income as shown from the Local 688; that the defendant did receive that salary, and that is the only salary he did receive during that period from Local 688.

Cross-Examination (Resumed), by Mr. Hennelly.

Q. I believe, Mr. Schmidt, when we stopped for the noon hour that we were discussing your memory, is that right?

A. Yes.

Q. I believe that the last question I asked you was whether or not you have not recently testified in the deposition that your memory had been impaired by an automobile accident? A. That is right.

Q. So that, as a matter of fact, your memory is off a little bit, sir? A. It is all right now.

Q. When did it pick up? When did your memory get better?

A. Well, it has been increasing right along.

Q. When was your deposition taken, do you know, sir?

A. Oh, I believe a week or two ago.

Q. Would you say that it was the 16th of September? That would be——

A. I don't remember the date exactly, no.

Q. But at that time you testified, didn't you, that your memory had been impaired? A. That is right.

Q. But since that time it has gotten better now, has it?

A. Getting better right along.

Q. All right today? A. My whole left side was paralyzed.

Q. But your memory is all right now, isn't it?

A. That is right.

Q. Now, then, with respect to those—I am going to hand you what has been marked for the purpose of identification as Defendant's Exhibit C.

I will ask you what that is, sir.

A. This is the deposit slip to Mound City Trust Company.

Q. In whose name is it, sir? A. John Schmidt, Junior.

Q. Is that the type of deposit slip you make out when you make a deposit over there?

A. I don't make this deposit slip out.

Q. Do you go over there when it is made out, sir?

A. No, I don't.

Q. Let me ask you this, sir. Do you recall now, after looking at that slip, whether or not on the date in question you made a cash deposit of $250.00?

A. $250.00 here, yes, sir.

Q. Do you recall now whether or not on that date you made that deposit? A. I don't remember.

Q. You remember whether or not along that time Mr. Berra repaid $200.00 to you?

A. Mr. Berra never repaid anything to me.

Q. I will hand you what has been marked for identification as Defendant's Exhibit D. That is an exhibit about the same type as the previous exhibit I showed you, isn't it, sir? A. Yes, sir.

Q. And what date is the date listed on that deposit slip?

A. 10/29/51.

Q. Is that a deposit slip for John F. Schmidt?

A. That is right.

Mr. Stanard: I would like to object, your Honor, on the ground that there has been no showing of the source of any of these deposits. Tend to prove nothing at the present stage in the evidence.

The Court: Well, they are not being offered yet. What is your objection?

Mr. Stanard: They don't tend to prove any issue in the case, your Honor, they are just deposit slips. He is being asked about deposit slips with no background as to why such a deposit would have any bearing on any issue in this case.

The Court: I do not know. Yes, I presume he is endeavoring to do—he may pursue his examination.

Q. (By Mr. Hennelly) How much of a cash deposit does that show? A. $200.00.

Q. I am going to hand you now, sir, what has been marked for the purpose of identification as Defendant's Exhibit E. A. $600.00, 11/9/51.

Q. That is a cash deposit also, isn't it, sir? A. Yes.

Q. Were you paid by check when you were paid by the L. H. I.? A. Yes, sir.

Q. I am going to hand you now what has been marked as Defendant's Exhibit F, and I will ask you what is the date of that slip? A. No date on this slip.

Q. What does that show, do you know, there, sir?

A. I was looking up here where it is supposed to be. That is where the rest of them are on there. These got all the dates on top. This has no date on top. It has a stamp down here at the bottom, 31/51, that's all I can make out.

Q. 31/51. And how much is that for, sir?

A. That's $800.00.

Q. Cash? A. I guess it is.

Q. Well, look at it. Does that say currency?

A. Yes, that is currency.

Q. Does this refresh your memory to determine whether or not Mr. Berra repaid any of these loans to you in cash?

A. No, that doesn't refer anything to Mr. Berra, because I can make deposits, and you got those deposit slips. That is no sign that Mr. Berra had anything to do with it.

Q. You were paid by the LHI in check, weren't you, sir?

A. Yes, sir.

Q. And you reported everything on your income tax, didn't you? A. Yes.

Q. Now, then, the work sheet which the Government had identified in evidence, that was a work sheet which was taken from your 1951 income tax return, wasn't it, sir?

A. Yes.

Q. That was made up by you?

A. My income tax was made by——

Q. The work sheet was made by you, and that work sheet was taken from a group of papers which were part of the tax return itself, wasn't it, sir?

A. The work sheet was taken from the amounts that I had spent from the different business houses and the salaries and the income.

Q. I am going to show you what has been marked for the purpose of identification as Defendant's Exhibit G. I am going to ask you what that is, sir?

A. Photostatic copy of my income tax.

Q. For the year 1951?

The Court: What did you say it was?

The Witness: Photostatic copy of my income tax.

Q. (By Mr. Hennelly) Is that a copy of your income tax return, sir? A. Yes.

Q. And was that returned? The original, was that returned and signed both by you and your wife?

A. I didn't see any signatures on this photostatic copy.

Q. Had you and your wife signed the original, sir?

A. Yes, sir.

Q. I am now going to hand you what has been marked for the purpose of identification as Defendant's Exhibits H and I, and I will ask you what they are, sir?

A. '52 income tax report.

Q. They are photostatic copies of the income tax return made out by you and your wife, isn't that right, sir?

A. That is right.

Q. And did you gather the information and supply the information to Mr. Troxler for the purposes of making out that return, sir? A. That is right.

Q. After that return was filled out, did you and your wife sign it, sir? A. Yes, sir.

Q. I will hand you now what has been marked for purposes of identification as Defendant's Exhibit J, and ask you what that is?

A. Photostatic copy of my income tax for '53.

Q. Is that the return which you and your wife made out which was eventually signed by you and filed by the Government?

A. Made out by O. A. Troxler, and we signed it.

Q. But you supplied the necessary information, isn't that right, sir? A. Yes, sir. It is right here on the back.

Q. Now, then, if you will refer please to Defendant's Exhibit G, which is your income tax return, and the return from which that original work sheet was taken, can you tell the Court and Jury how much money you showed as your net income for yourself that year? A. (No response.)

Q. How much money did you show that you made out of your painting business for that year, sir?

A. That's a total of——

Q. Sir? A. Is that total line, 11/20?

Q. Net profit. A. $1,709.11.

Q. Is that right, sir? A. That's what it says here.

Q. I will ask you, sir, if you recall testifying in this same deposition to which you referred to, that your net income for the year 1951 was approximately $5,000.00?

A. Repeat that again.

Q. You recall testifying in your deposition on September 16th—as a matter of fact, your net income for the year 1951 was approximately $5,000.00.

A. I said I did not know what my income was.

Q. Did you say, do you think, that you made $5,000.00?

A. The man made these figures. He asked me if I thought I made that much. I said I could or couldn't have.

Q. That you could or couldn't have?

A. That's right. Possible that I could have and that I couldn't have. Never had my tax papers.

Q. If you add to the $1,700.89 this check for $1,160.00 and the amount of money that you gave Mr. Berra, that would amount to about $5,000.00 for that year, wouldn't it?

A. Let me see that, sir.

Q. The check——

A. Of 1951 bills that we figured up, were there any statements in there, $1,160.60?

Q. An invoice, sir? A. Yes.

Q. Yes, sir. This is part of the Government's Exhibit 2-E.

A. This bill here is January 29, 1950. This check is February 9, 1951.

Q. Let me have it, please. When was that paid though, sir? You check. When does that red mark show that check was paid?

The Court: You mean the bill paid?

Mr. Hennelly: Yes, sir.

A. 2/9/51.

Q. (By Mr. Hennelly) 2/9/51? A. Yes, sir.

Q. Didn't you indicate that you reported everything that you received?

A. Yes, but it is possible that this here bill was of '50 work and I got the check in '51. This check was mailed to me. This is for—I got the check in '51 but the bill was in '50.

Q. Do you know when you deposited the check to your account? A. No. Offhand, I don't remember that.

Q. I am going to hand you what has been marked for the purposes of identification as Defendant's Exhibit K, and I will ask you what that is, sir?

A. This is my income tax for '50.

Q. For 1950? A. Yes.

Q. Is that the photostatic copy of the return which you gave the information to Mr. Tr[illegible] to have made out?

A. Right.

Q. I am going to ask you, sir, can you look at that return and tell me whether or not you paid a tax on that $1,160 for the year 1950? A. No, I didn't.

Q. As a matter of fact, you do pay at the time you receive it? A. I do what?

Q. You pay the tax for the year in which you receive the cash? A. I sure do.

Q. So, if you received that check in February, 1951, it should have been reported on your 1951 income tax, shouldn't it?

A. I don't know. I guess it should have.

Q. Did you forget to include that that year, sir?

A. I don't know. I don't remember.

Q. Did you deposit this check to your account?

A. Yes, sir. I guess I did.

Q. Do you think though, that it is possible that you didn't include that check?

A. I don't know. I don't remember.

Q. Isn't it a fact, sir, that because this check was on a different account and being a different color, that you just didn't make a return on that check?

A. Why shouldn't I make that return?

Q. Because you wanted to keep from paying the government the tax, sir.

A. No, sir. If anything like that was passed up, it wasn't intentional.

Q. Do you think now it is possible that this biggest check that you got in 1951 that you just intentionally didn't include it?

A. I wouldn't say that because I don't remember the check.

Q. Have the agents from the Internal Revenue Department discussed this particular check with you? A. No, sir.

Q. Did you turn over all of your records to them?

A. Yes.

Q. Now, then, with respect to your income tax for the year 1952, do you, did you include all of your income in that year, sir?

A. I don't remember. You have got the papers there and Mr. Troxler made them out.

Q. You don't remember whether or not you made out an honest return for that year, sir?

A. To my knowledge, yes.

Q. I want you to look at this return, sir.

Mr. Stanard: Your Honor, I object to this line of questioning concerning 1952.

The Court: Sustained.

I was wondering when you would come to life. We are not trying this witness, we are trying the defendant.

Mr. Hennelly: Your Honor, I submit this is the type of examination which——

The Court: I have sustained the objection.

You may go into the subject as to whether or not he included in his return these payments which he claimed he put on to the bills of the Labor Health Institute and gave the money to the defendant. Now, he said in his direct examination that he showed on his income tax return, he showed a credit, paying them to the defendant.

That is the extent of your inquiry.

Mr. Hennelly: I shouldn't want to argue with the Court.

The Court: I do not care to argue with you.

Mr. Hennelly: May I make an offer of proof, sir?

The Court: Yes, you can make an offer.

Mr. Hennelly: The defendant wishes to show by this witness that for the year 1952 that there were certain items of income which were left off of his 1952——

Mr. Stanard: Your Honor, this offer of proof is being made to the jury.

Mr. Hennelly: I didn't try to make it in front of the jury.

(Whereupon, the Court beckoned the reporter to the bench where the proof was concluded.)

Mr. Hennelly: (Continuing) The defendant lays this ground work because they are in a position to show that

there are certain specific items which were omitted from his 1952 return.

The record will show the same objection to 1953, and for that purpose we wish to show that the defendant, rather, that the witness was presently on the stand. Mr. Schmidt did not include all of his income for the year 1953.

We do this to show the bias and prejudice of this witness, to show that he has an interest in the case and for the ground work, to show he was under income tax investigation and that certain of the elements in this case are destruction of certain records that inured to this witness personally, and that he has a direct interest in his testimony here today.

Mr. Stanard: I object, your Honor, on the ground it is irrelevant and has no tendency to prove any issue in this case.

The Court: Sustained.

I don't remember the first time that Mr. Berra told me to stop keeping records. He told me that constantly. It was probably shortly after I gave him the first check. After he started receiving the payments he told me to put a note up near my name so that he could tell how many payments had been made. He came to me one time and said, "What payment is this now?" So I told him I would mark them from then on. We both agreed and I told him where I would put the mark. Mr. Berra knew from the very beginning that the records which the L. H. I. had, had a notation on it which showed some arrangement between me and him. I can identify Government's Exhibit 6-F, which is a check made out by me drawn on my bank account at the Mound City Trust Company, dated April 10, 1952, in the amount of $319.30. It has Mr. Berra's endorsement on the back and also has on the back the endorsement of the Singer Sewing Machine Company, 5926 Easton Avenue, St. Louis, Missouri. This check was also charged against the L. H. I. as the result of an arrangement I had with Mr. Berra. He told me to put this on his bill, too, in the same way. At first I told the Government investigators that this was an outright gift and had nothing to do with our arrangement, but I later changed

my story. I didn't want to tell a lie. Yes, I did tell the Grand Jury that it was an outright gift. I was under oath at that time. The first time I saw any of these gentlemen with the Internal Revenue Department was March 18, 1954. They hadn't yet been out to my home. On March 18, 1954, I didn't know that I was ever going to be called to testify in any case. Mr. Berra told me when he called me up that if I was to testify, which was in February, that I should stick to his story and say it was a loan. At the time I first saw these men on March 18, at the L. H. I. building, my records were not intact. They had been destroyed. The first time Mr. Berra had ever spoke to me and urged me to destroy the records was sometime in February. He spoke to me constantly of destroying those records. He told me to destroy the record on February 22nd and on various times thereafter and in the basement of his home. I actually destroyed the records on the night of the 24th. I only destroyed records concerning Labor Health. After I destroyed the records he called me and I told him and he asked me to come to his house. No agent had yet been out to my house. I hadn't yet talked to any members of the Internal Revenue Department. At least a month elapsed from the time I saw Mr. Berra at his home to the time that I was first interviewed by members of the Internal Revenue Department. On the first occasion they interviewed me, I told them that all the work which had been billed against the L. H. I. had really been done. I told this to Mr. Shearer and Mr. Brown. On at least one occasion I had told the investigators from the Bureau of Internal Revenue that these checks to Lou Berra were loans and that he had paid me back in cash. I told these men that I loaned Mr. Berra some money unbeknown to my wife and that's why I destroyed those checks, so she wouldn't find out. Berra had told me to say that. That was on the second occasion that the men came out to see me. They didn't ask me if I had deducted the payments, and they didn't have my tax returns. I was not under investigation by Internal Revenue, and didn't tell anyone from the Cook Paint Co. I was. I have not been indicted for income tax evasion. No promises were ever made to me by any members of the Internal Revenue Department. I made out a bill for painting Berra's house but he never paid me a

cent. I didn't even know on March 18th that I was going to have to testify. I had never told anybody on March 18th that I wanted to testify. I didn't tell anybody anything. I didn't express any desire to testify on March 18th.

Recross-Examination, by Mr. Hennelly.

Q. Is it your statement now, sir, that there have been no promises of any kind made to you sir? A. Absolutely.

Q. Have there been any discussions with you, of any kind, about your income tax return? A. No.

Q. The Internal Revenue Department hasn't even discussed your own income tax situation, is that right?

A. No, sir, if there is an error there they will find it.

Redirect Examination, by Mr. Stanard.

Q. Mr. Schmidt, I show you what has been marked as Defendant's Exhibits E, D and F, and I ask you if you made those deposits out yourself?

A. No, I didn't make those deposit slips out myself.

Q. Do you know who made them out?

A. Mr. Troxler, Vice-president of the Mound City Trust Company.

Q. Was that your usual custom to have Mr. Troxler make out your deposit slips?

A. He lives a few blocks from my house and I would go to him and he would make out those deposit slips for me.

Q. I believe you testified that you have no independent recollection of the source of these cash deposits, is that correct? A. No.

Q. Defendant's Exhibit E is a deposit slip to the account of John F. Schmidt Painting Company, dated November 9, 1951, for $600 in one item, is it not, one figure of $600? A. That is right.

Q. I show you what has been marked for identification as Government's Exhibit 6-P and I ask you if you can identify it?

A. This is a check of November 7, 1951, for $676 from Labor Health Institute.

Q. Six hundred and seventy-six dollars?

A. That is right.

Q. Is there a stamp on that check which shows when it was deposited? A. Deposited November 9, 1951.

Q. Now, do you have any recollection as to this deposit of $600 on November 9th?

A. Let's see the check. It could be possible that I had cashed this check.

Q. Excuse me, Mr. Schmidt, does that stamp show that it was deposited or cashed? Was it cashed, can you tell from the endorsement? A. It was cashed.

The Court: What was your answer, I can't hear you.

The Witness: It was cashed.

A. (Continuing) It is possible that this check here was deposited.

Mr. Hennelly: I am going to object here, your Honor, the answer is too vague and speculative.

The Court: He hasn't finished his answer yet. I don't know what it is.

What is your answer?

The Witness: It could be possible that this here check was deposited and that I took $76 in cash, could come out to this here $600 which is done quite frequently.

Mr. Hennelly: I am going to object and ask that that be stricken as being too indefinite and vague.

The Court: Sustained.

Q. (By Mr. Stanard) I believe you testified that this Defendant's Exhibit D, a deposit slip for $200 was made out by Mr. Troxler? A. That is right.

Q. It bears the date of 10/29/51? A. That is right.

Q. I show you what has been marked as Government's Exhibit 6-N and I ask you to identify that.

A. This check was made out October 23, 1951, for $705.65.

Q. Made out by whom and to whom?

A. Made out by the Labor Health, whoever made it out. I don't know, but from the Labor Health Institute to me, I cashed that at the Theis Service Station.

Q. On what date, do you know?

A. The date that I cashed it, probably October 23rd.

Q. Do you remember what you did with the money you got from cashing that check?

A. Well, whenever I cashed the check here at Mr. Theis' Filling Station, it's possible that I needed some money and I would keep what I needed and would give Mr. Troxler the rest to be deposited.

Mr. Hennelly: I object to that as being too vague and indefinite.

The Court: I will let that answer stand.

Q. (By Mr. Stanard) I believe you testified that the Defendant's Exhibit F, a deposit slip for $800 was made out by Mr. Troxler also, is that correct? A. That is right.

Q. Can you find a date on there, Mr. Schmidt?

A. There is no date up here, we went by that date down here (indicating), I see 31/51.

Q. 31/51? A. That's right.

Q. Could that be October 31, '51?

A. I can't make that part out on that stamp.

Q. I believe on your cross-examination it was stated that it was October 31st and that was inverted——

A. (Interrupting) When I stated about this statement here I said it was 31/51, I can't make out the month.

The Court: You can't make out the month, is that it?

The Witness: No, I can't.

(Discussion at the bench.)

Mr. Rehm: Your honor, it is agreed between the parties that it is October, we agreed to that and so did the plaintiff.

The Court: Very well, agreed that the date there is October 31.

Q. (By Mr. Stanard) Mr. Schmidt, I show you what has been marked as Government's Exhibit 6-O and ask you to describe it.

A. A check from Labor Health Institute, October 29, 1951, made out to John F. Schmidt for $638.21.

Q. What was that date again? A. October 29th.

Q. I see. What does the endorsement show?

A. That this was also cashed at Theis' Filling Station.

Q. Do you remember cashing that?

A. I cashed quite a few checks there, I don't remember this particular check.

Q. Is this check for $831.29 drawn on October 29th?

A. That is right.

Q. Mr. Schmidt, at any time has any representative of the Government made you any promises of any sort in connection with your testimony?

A. No, sir, I made this testimony voluntarily.

Q. Has there been any promises or hint of immunity or anything of that sort? A. No, sir.

Q. Now, you stated on your cross-examination that you had made a statement to revenue agents that was not the truth, isn't that correct? A. That is right.

Q. I believe you also stated that you made a statement before the Grand Jury that it was, that the statement you made before the Grand Jury was untrue, is that right?

A. That is right.

Q. Would you tell the jury why you made those two false statements?

Mr. Hennelly: I object to the form of the question.

The Court: Overruled.

Q. (By Mr. Stanard) Tell the jury why.

A. Because I was listening to Mr. Berra's statement that it was a loan and I knew that it was a lie and I was telling a lie down there and it wouldn't go anywhere and that's why I changed my statement and told the truth.

Mr. Hennelly: I am going to object and ask that that be stricken.

The Court: Overruled.

Q. (By Mr. Stanard) Did Mr. Berra ever pay you any money in cash, Mr. Schmidt?

A. None whatsoever that I know of.

Mr. Stanard: That is all.

ROSE SCHMIDT testified as follows:

Direct Examination, by Mr. Stanard.

My name is Rose Schmidt. I am the wife of John Schmidt. My husband is in the painting business. I know that he has done work for the Labor Health Institute. I have received quite a few telephone calls at home for Mr. Schmidt. I have received a telephone call at my home from a person who stated he was Mr. Louis Berra. This person has asked for Mr. Schmidt. Yes, he has left a message for Mr. Schmidt to call him. On those occasions when this person who identified himself as Mr. Berra left word for Mr. Schmidt to call him I know of my own personal knowledge that Mr. Schmidt did call Mr. Berra. I remember that Internal Revenue Agents came out to my house. They came out to our house two times that I know of. I know a Mr. Troxler. Mr. Troxler came out to my house at a period in time close to one of the visits of these Internal Revenue Agents. This was sometime around income tax time. What date, exactly, I could not say, in the year 1954. Around that time one evening I received a large number of telephone calls. One evening about the second time that the Revenue men had been out there, I received nine calls in one evening from Mr. Berra and when Mr. Berra had called I told him that the revenue men came out and subpoenaed Mr. Schmidt along with his income tax and his check stubs and everything and took him downtown. Mr. Berra made the remark, "I hope to Christ that Schmidty sticks to his story."

Cross-Examination, by Mr. Hennelly.

I signed the 1951 income tax return with Mr. Schmidt. It is a joint return. I have never met Mr. Berra personally. I have only conversed with him on the phone. Prior to January 1st, 1954, I did not talk to him on the phone very often. I do not know how many times I talked with him in January of 1954 or February of 1954. I don't know exactly how many times I talked with him in March of 1954. Yes, sir, one night I got nine telephone calls. It was after this investigation had begun. I did not make any notes to determine the amount of calls but my daughter was living with me at the time and we both

together counted them. On this night that Mr. Berra called, it is my testimony that this was the second time that the revenue agents had been out to our house. That is the night that they took Mr. Schmidt downtown. Mr. Troxler had been out to our house sometime before the evening in which I had received the nine telephone calls. I had already made out our income tax return for the year 1954. By the time Mr. Troxler got there, sometime in March I think.

Redirect Examination, by Mr. Stanard:

When I used the phrase in my direct testimony that "they took him down to the Federal Building" my husband wasn't under arrest. They had just come out and handed him a subpoena and gave him a list of items to bring.

GLENN HALEY testified as follows:

Direct Examination, by Mr. Rehm.

My name is Glenn Haley and I am the Cashier at the Plaza Bank, located at 1231 Olive, in the City of St. Louis, and I have had this position for about five years. I was subpoenaed to bring certain records. I can identify what has been marked as Plaintiff's Exhibit 7-A. It is a deposit ticket used in our bank. There is a marking on the deposit slip showing the numbers 4/9/7. These numbers describe the item that was deposited and the bank it was drawn on. It shows that a check was drawn on the Mound City Trust Company and deposited to Mr. Berra's account. I can identify what has been marked as Plaintiff's Exhibit 7-J. It is a ledger sheet from the records of the bank for the account of Louis Berra or Mary Berra, for the period April 2, 1954, and goes down to August 18, 1954. It also begins with September 14, 1950, so there is really a record from September 14, 1950, down to April 2, 1954. I am familiar with these ledger sheets in that they show deposits and also withdrawals. When you take the period of August 20, 1951 to August 24, 1951, there is an entry for $650.00 on August 20th, showing a deposit to this account. There are withdrawals on August 21, for $63.10 and on

August 24 for $650.00. The $650.00 withdrawal on the 24th was the result of a check drawn by Mr. Berra. There would be no reason why his account would be debited for that. Yes, I can identify Exhibit 7-B. It is a deposit ticket to Louis Berra's account. It is in the amount of $850.00. It shows a deposit of $200.00 cash and a check for $650.00. It has the same marking on the deposit slip as the previous deposit slip. There is also on there a counter notation which reads, "hold $650 until August 30, 1951." The reason that his account would have been debited with that $650.00 on August 24, the only possible reason would be that the item deposited had been returned. It may have been returned for insufficient funds or for a wrong endorsement or something like that. I can identify what has been marked as Plaintiff's Exhibit 7-C. It is a deposit ticket in the amount of $600.00 for Louis Berra's account, $200.00 cash and a check for $400.00. The date is September 25, 1951. I can identify what has been marked as Plaintiff's Exhibit 7-D. It is a deposit ticket for $650.00 to Louis Berra's account, dated October 9, 1951. It was a check drawn on the Mound City Trust Company. Exhibit 7-E is a deposit for $225.00 to Louis Berra's account, on November 9, 1951. It was a check for $225.00 to the Mound City Trust Company. I can identify Plaintiff's Exhibit 7-F. It is a deposit of $400.00 to Louis Berra's account. The deposit slip is dated February 1, 1952. The deposit was a check drawn on the Mound City Trust Company. Exhibit 7-G is a $350.00 deposit to Louis Berra's account. The deposit slip is dated February 19, 1952, a check drawn on the Mound City Trust Company. Exhibit 7-H is a deposit slip in the amount of $200.00 to Berra's account dated February 29, 1952, for an item on the Mound City Trust Company. Exhibit 7-I is an item for $400.00 deposited to Lou Berra's account dated April 10, 1953, through the Mound City Trust Company.

Cross-Examination, by Mr. Hennelly.

That first deposit of $650.00 and the later reflection of the record of a withdrawal of $650.00 could have been as the result of the original $650.00 check "bouncing."

EDWARD HOORMANN testified as follows:

Direct Examination, by Mr. Rehm.

My name is Edward Hoormann. I am employed at the Mound City Trust Company. I was subpoenaed to bring in some records. I am the supervisor of the bookkeeping department. I pass on all checks and deposits that are received from the tellers as to any question of where they go, also to supervise where they go. I supervise the operations and posting of the eight individual girls and four others that assist them in setting up and posting and depositing to individual checking accounts. I have supervision of the books and records, including the ledger sheets and statement sheets. I know that John F. Schmidt has been a customer of our bank. At present his particular account is closed. I can identify what has been marked as Plaintiff's Exhibit 8-A. It is the standard form we use of ledger sheets for all checking accounts at the Mound City Trust Company. It is the account of the John F. Schmidt Painting Company, 416 Alicia, Ferguson, Missouri. It covers the period from November, 1950, to March 8, 1954. It shows all the deposits and withdrawals to the John F. Schmidt Paint Company account during that period of time. Directing my attention to August 20, 1951, and looking at the John F. Schmidt ledger sheet, I see that on August 20, 1951, there is a $200.00 deposit. On August 21, there is a debit to that account in the amount of $650.00. There is also an error correction to offset that debit on that same date. That error correction was because at that particular time there was not sufficient balance to cover the $650.00 check. This Exhibit, the ledger sheet, shows that he had a balance of $577.78 at that time. Subsequent to that time there was another entry relative to the $650.00. This was on August 27, when $650.00 was debited to the account. I used to be paying and receiving teller. I am familiar with the markings and identifications on checks. I can take what has been previously identified as Plaintiff's Exhibit 6, and by looking at this check, the markings and the holes in it, I can tell that this check was either cashed in whole or in part. This is because the markings for checks cashed either in whole or in part would be the teller's individual stamp on the check. The man could have deposited the $600.00 of it and taken

the rest in cash and the check would be handled as though he cashed the entire check. In other words, if the payee on that check had gone to the bank with $672.00 check and had wanted $72.00 back it would be entered as and deposited as a check that had been cashed. It would be what we call in our bank a less-cash deposit. The amount of the check minus whatever cash he requested in return.

Cross-Examination, by Mr. Hennelly.

Yes, it is correct that as far as I can determine, that original check for $650.00 was returned for insufficient funds and then was redeposited and debited to the John F. Schmidt account.

GEORGE F. SCHERER testified as follows:

Direct Examination, by Mr. Rehm.

My name is George F. Scherer. I am an Internal Revenue Agent. I am employed by the District Director of Internal Revenue, St. Louis, Missouri. I am an accountant. I have been so engaged for approximately six years and four months. I acquired an accounting background at the St. Louis University School of Commerce and Finance with an associate degree in June of 1948. Since that time I have been pursuing the profession of accountant with the Bureau. I inspect returns assigned to me by my supervisor; determine the scope of that examination; examine the return and compute the taxes or penalties if applicable, based upon my examination. Since I have been with the Bureau I have examined approximately six hundred returns. I know the defendant, Mr. Berra, in this case. I first saw him February 1st, 1954, at 1127 Pine Street. This was a business visit. I was assigned to the tax returns of the Labor Health Institute for auditing and examination. When I met Mr. Berra he was the manager of the St. Louis Labor Health Institute. He identified himself as the manager of the St. Louis Labor Health Institute. The returns of the St. Louis Labor Health Institute had previously been assigned to another revenue agent by the name of Lester Miller for examination. The

returns were subsequently transferred to me and on February 1, 1954, we went to the offices of the Labor Health Institute at 1127 Pine where we contacted Mr. Berra and advised him that I was continuing the examination previously started by Mr. Miller and requested the books and records of St. Louis Labor Health at that time. I did not obtain these books at the L. H. I. at that time. We then returned to the office where a summons was prepared for Mr. Berra to produce the records of St. Louis Labor Health Institute and I witnessed the serving of a summons that afternoon, upon Mr. Berra as business manager. Subsequent to this I saw him again. This was on February 3, 1954. He came into the offices of the District Director on the 8th Floor there in answer to the summons that we had served on February 1st. The next time I saw Mr. Berra was on February 5, 1954. At this time I went to the offices of the Labor Health, 1127 Pine, where the books and records of the St. Louis Labor Health Institute were maintained and they were made available to me that morning and we went to the conference room on the second floor where Mr. Berra and various other personnel of the L. H. I. were present and upon properly identifying us, to discuss the scope of our examination, and we commenced the examination. For the next few days, we worked on the L. H. I. books at the L. H. I. offices. Mr. Berra observed us working on the books. On February 9, 1954, we contacted Mr. Berra again. We requested the books of Local 688 from Mr. Berra. We had another conversation with Mr. Berra on February 10, 1954. On February 8, when we asked for the records, we were told that Mr. Berra didn't have the authority to give us the records, so on February 10th I witnessed the serving of a summons on Mr. Berra for the records of Local 688. That was on the 10th. After February 10th I saw Mr. Berra again on February 12, 1954. We had a meeting in the conference room that day with Mr. Berra, and I believe their attorney was present, and Mr. Berra in answer to the summons stated he did not have the authority to give us the records of Local 688. I had another conversation with Mr. Berra on February 17th, 1954, at the offices at 1127 Pine. Present were Mr. Berra, and Mr. Brown, the Revenue Agent, who was assisting me in the examination. At that meeting we asked Mr. Berra to show us the safety deposit

boxes of Labor Health Institute in the Mercantile Trust Company. I had another conversation with him on the 22nd of February, 1954. We asked and received from Mr. Berra a list of the present officers of the St. Louis Labor Health Institute. My next interview with him was on the 26th of February, 1954. We entered the safety deposit boxes of the L. H. I. in the Mercantile Trust Company. Mr. Brown, Mr. Berra and I, and a Mr. Saffo were present. That was on February 6th, 1954. On March 2, 1954, we inventoried another box at the Mercantile Trust Company, in the name of Mr. Saffo, and Mr. Berra was also present. We had another conversation with him on March 4, 1954. We were over at the offices of the L. H. I. continuing the audit of their records and we had a general discussion in the back office; Mr. Berra, Mr. Brown and I. On April 2, 1954, we had a conversation, when we checked the current petty cash vouchers and requested those vouchers from Mr. Berra. Later in the afternoon Mr. Berra came in and asked that all future requests be reduced to writing. During this period and immediately subsequent thereto I had the personal tax return of Mr. Berra for audit and examination. I had the federal income tax returns 1040 for the years 1951 and 1952 and 1953. These Exhibits that have been previously identified as Plaintiff's Exhibits 1-B, 1-C, and 1-D are the returns that I am referring to. They were not all assigned to me at the same time. On April 20, 1954, the 1952 return was assigned to me. On April 23, 1954, the 1951 and 1953 returns were assigned. We started our examination of defendant's individual returns in conjunction with the information that we were securing relative to St. Louis Labor Health Institute. At that time we also secured information pertaining to Mr. Berra's income tax returns. No records, papers, audit, or cancelled checks of the defendant were made available to me. We did obtain related information from third parties, and, if it had anything to do with Mr. Berra, we would also obtain that information. We checked bank records and third parties. We checked the records of the John F. Schmidt Painting Company and of the J. Shulman and Sons Company, and also the Melcher-Schene Hardware and Lumber Company. On Exhibit 1-B, that is Government's Exhibit 1-B, which is the defendant's 1951 return, he shows there as his source of income a salary from the St.

Louis Labor Health Institute, together with reimbursed expenses, in the amount of $7000.00. The return shows $5,600.00 salary and $1,400.00 expense allowance as having been received from the L. H. I. I checked the records of the L. H. I. to verify these payments. I have been in the courtroom during the entire trial and I've heard the testimony of all the witnesses in this case up to this point. I recall the testimony of John F. Schmidt of the John F. Schmidt Painting Company. Assuming that a payment of $2,000.00 was made to Lou Berra by Mr. Schmidt, as testified to by Mr. Schmidt in this case, such a payment is not reported any place in the defendant's 1951 return, Exhibit 1-B. I am looking at Government's Exhibit 4-K, which is a bill from the Herchert Contracting Company of November 13, 1951, in the amount of $542.19. There is no mention of this amount as income in defendant's 1951 return. I am examining Plaintiff's Exhibit 4-A, which is a bill from Herchert Contracting Company, dated August 31, 1951, in the amount of $412.00. There is no receipt of that money or income reported in defendant's 1951 tax return, that is Plaintiff's Exhibit 1-B. There is no such item listed in the return. I am examining Government's Exhibits 5-A and 5-B, which are for material from Melcher-Schene, dated November 21, 1951, charged to the L. H. I. and delivered to 3120 Hampton, in the amount of $196.75. There is no reference to that as an item of income in the defendant's 1951 tax return.

There was then offered and received into evidence Plaintiff's Exhibits 4-A and 4-K. Also offered and received in evidence were Plaintiff's Exhibits 4-B to 4-J. Also received in evidence were 4-L through 4-W, including the Exhibits 4-1-S through 4-5-S. Court sustained the defendant's objections to the admission of Plaintiff's Exhibits 5-A and 5-B.

At this point, 4:31 p. m., Tuesday, September 28, 1954, a recess was had until 10:00 a. m., Wednesday, September 29, 1954. Pursuant to the overnight recess, the trial was resumed at 10:00 a. m., on Wednesday, September 29, 1954, and the jury being present the following proceedings were had.

The Court admitted into evidence Government's Exhibits 1-A, 1-B, 1-C and 1-D; Government's Exhibits 4-A to 4-J

were offered and received again into evidence. Also offered and received in evidence were Government's Exhibits 4-K to 4-W, including Exhibits 4-1-S through 4-5-S. Also Government's Exhibit 6-A, Schmidt's 1951 work paper, was received into evidence. Also offered and received into evidence were Government's Exhibits 2-A and 2-B, which are L. H. I.'s records of the earnings and payments to defendant Berra during the year 1951 and 1952. Similarly offered and received in evidence were Government's Exhibit 2-D, which is J. Shulman and Sons bill to the L. H. I. for the period between August 10 to December 14, 1951. This constitutes a series of bills.

The following stipulation was made:

The Court: Let's get it straight now. Let the record show, Mr. Reporter, that the stipulation heretofore entered into, relative to admission of the allegations of Paragraph 4 of Indictment 27857, was in error, and that what was intended was that defendant admits the allegations of Paragraph 2 of the indictment and, further, that the defendant had knowledge that such investigations were being made at the time referred to in the indictment. Now, that is what you intended to do.

The witness, GEORGE SCHERER, resumed the stand.

Direct Examination, by Mr. Rehm.

I have been in this court during the entire trial. I am familiar with the testimony and the exhibits which have been received in evidence in this case as pertains to count one of the indictment of tax evasion, which involves the 1951 return filed by the defendant, Government's Exhibit 1-B. I have in my hand Government's Exhibit 1-B. I made a total of the items as represented by Government's Exhibit 6-A as relates to this case relative to payments made by Mr. Schmidt to Mr. Berra during the year 1951, including Government's Exhibits 4-K and 4-A. The total of these items is $2,954.19. The items consist of $2,000.00 paid to Louis Berra by John F. Schmidt, $412.00 to the Herchert Contracting Company for work done at Mr. Berra's home and $542.19 to the Herchert Contracting Company for work done at Mr. Berra's home, a total of

$2954.19. I made a total of the defendant's entire income, taking into account those exhibits and those on the return. The total was $9,954.19, less an adjusted gross item of expenses allowable one eighty, corrected adjusted gross income of $9,774.19. On Page 3 of Plaintiff's Exhibit 1-B, under the tax computation, line one, as adjusted gross income is entered the figure $6,820.00. Based upon the evidence in this case that figure is not correct. Based upon the evidence in this case I made a total of defendant's adjusted gross income for the year 1951. The total was $9,774.19. On Page 3 under the tax computation, Item 2, which is the statutory deduction, there is a figure there of $1,642.78. Based on the evidence in this case, I have made a total of the defendant's net income for the year 1951. The total is $8,131.41, which is allowing the statutory deductions of $1,642.78 from the corrected adjustment gross income of $9,774.19. Based on the evidence in this case, my testimony is that the defendant had an adjusted gross income of $9,774.19, and statutory deductions in the amount of $1,642.78 and a net income of $8,131.41 for the year 1951.

Q. Now, Mr. Scherer, I will ask you, asuming that an individual whose residence is in the City of St. Louis, and who was employed in the City of St. Louis, Missouri, and whose regular accounting period was on the basis of a calendar year, and assuming that such indivdual derived and received an adjusted gross income of $9,774.19, and further assuming that such individual was entitled to and allowed by the provisions of the Revenue Act of the United States statutory deductions in the amount of $1,642.78, and further assuming that the individual was a married man with two dependents other than himself and his wife, and further assuming that a taxable adjusted net income for such individual for the calendar year beginning January 1, 1951, and ending December 31, 1951, was $8,131.41, and further assuming that such individual filed a personal tax return, what amount of income tax would you say such individual owed and should have paid the government for that calendar year?

Mr. Hennelly: Defendant will object, if your Honor please, for the reason that the question assumes certain facts which are not in evidence, does not assume all of

the necessary elements to the question, and for the further reason that there has been no evidence in the case upon which this witness could reach the necessary conclusion asked in the hypothetical question.

The Court: Overruled.

A. The tax would be $1,203.84.

Q. (By Mr. Rehm) Sir, directing your attention to page 1 of Exhibit 1-B, I ask you to tell the Court and Jury what defendant has entered as his tax as due for the year 1951. A. $566.54.

Q. I now show you what has been identified in evidence as Plaintiff's Exhibit 1-C, sir, which is the 1952 tax return —as the 1952 tax return of Mr. Berra, and ask you if you have seen that before? A. I have.

Q. Is that one of the returns which was assigned to you for audit, sir? A. It was.

Q. What item or items of income are shown on this exhibit, sir?

A. Salary, reimbursed expenses from the Union Warehouse, Union Local 688, in the amount of $2,125, salary and reimbursed expenses from Labor Health Institute in the amount of $6,120, a total income of $8,245 less allowable expenses of $1,500, or an adjusted gross income of $6,695.

Q. Sir, I ask you, have you checked the records of L. H. I., to verify the payments to Mr. Berra during 1951?

A. Of L. H. I.?

Q. Of L. H. I. A. I did.

Q. Were they the same? A. They were the same.

Q. I show you, Mr. Scherer, what has been marked Exhibit 6-B, been identified as a check dated February 1, '52, to Louis Berra, in the amount of $400. I will ask you, sir, if Exhibit 6-B is included in the defendant's return filed for the year 1952.

Mr. Hennelly: I object, if your Honor please. It is irrelevant and immaterial.

The Court: Overruled.

A. It was not included.

The Court: What's the amount?

The Witness: $400, your Honor.

Q. (By Mr. Rehm) I show you what has previously been identified as Government's Exhibit 6-C, a check in the amount of $350, dated February 18, '52, to the order of Louis Berra, and ask you, sir, if Exhibit 6-C is included in the defendant's tax return for the year 1952?

A. It is not.

Q. I show you Exhibit 6-D, sir, a check dated February 29, 1952, in the amount of $200, paid to Louis Berra from Schmidt Paints, and ask you, sir, if Exhibit 6-D is included in the defendant's return for the year 1952?

A. It is not.

Q. I show you Exhibit 6-E, sir, a check from Schmidt Painting Company, dated March 25, '52, in the amount of $200, payable to Lou Berra, and ask you, sir, if Exhibit 6-E is included in the defendant's return for the year '52?

A. It is not.

Q. I show you Exhibit 6-F, sir, a check payable to Lou Berra, dated April 10, '52, in the amount of $319.30. I ask you, sir, if government's Exhibit 6-F is included in the defendant's tax return. A. No.

Q. For the year '52.

I show you Exhibit 6-G, check dated November 14, 1952, in the amount of $300, payable to the order of cash, and ask you if this Exhibit 6-G is included in defendant's return for the year 1952? A. It is not.

Q. I show you Exhibit 6-H, a check dated December 12, 1952, payable to the order of Lou Berra, in the amount of $400, and ask you if Exhibit 6-H is included in the defendant's tax return for the year 1952? A. No, it is not.

Q. Exhibit 6-I, a check dated December 24, '52, from Schmidt Painting Company in the amount of $100, payable to the order of Lou Berra. Is 6-I included in the defendant's tax return for the year 1952, sir? A. It is not.

Mr. Rehm: Your Honor, at this time I would like to offer in evidence Plaintiff's Exhibits 6-B to 6-I inclusive, sir.

The Court: They will be received.

(The documents marked Plaintiff's Exhibits 6-B to 6-I, inclusive, were received in evidence.)

Mr. Hennelly: May we ask that all of the testimony with respect to these checks by this witness be stricken for the reason a proper foundation was not laid.

The Court: Overruled.

Q. (By Mr. Rehm) Sir, I will ask you if you have made a total of Government's Exhibits 6-B to 6-I, sir? A. I have.

Q. What was that total, sir? A. $2,269.30.

The Court: $2,269.30?

The Witness: Thirty, yes, your Honor.

Mr. Hennelly: Your Honor, I am going to object to that and ask that it be stricken for the reason a certain section is apparently beyond the scope of the indictment.

The Court: Overruled.

Q. (By Mr. Rehm) You say the total was $2,269.30 of those exhibits? A. Yes.

Q. I direct your attention to page 3, Item 1, of tax computation of Plaintiff's Exhibit 1-C, sir, and ask you to tell the Court and Jury what is entered there as defendant's adjusted gross income? A. $6,685.

Q. Sir, I ask you if based on the evidence in the case, that figure is correct?

Mr. Hennelly: I object to the form of the question.

The Court: Sustained.

Q. (By Mr. Rehm) Sir, based on the evidence in the case, what do you find the defendant's adjusted gross income to be, and tell us how you arrive at that figure.

Mr. Hennelly: I object to the form of the question, if your Honor please.

The Court: Sustained.

Q. (By Mr. Rehm) Sir, did you add the figure adjusted gross income as per the return for 1952, $6,695.50, sir, to the figure of the total of Exhibits 6-B to 6-I, sir? A. I did.

Q. What was that total, sir? A. $8,964.30.

Q. That figure would be the adjusted gross income?

Mr. Hennelly: I object to the form of the question, your Honor, as invading the province of the jury.

The Court: That would be the adjusted gross income if the checks represented by Government's Exhibits 6-B to 6-I was included, is that your testimony?

The Witness: That would be the total, Your Honor.

The Court: Proceed. Overruled.

Q. (By Mr. Rehm) Tell the Court what the defendant has entered on line 2 of the tax computation of page 3 of the return for '52 under statutory deductions, sir?

A. $1,180.50.

Q. Sir, assuming that Exhibits 6-B to 6 I are income to the defendant, tell the court and jury what the defendant's net income for the year 1952 was and how you arrived at that figure?

Mr. Hennelly: I am going to object to the form of the question, if Your Honor please.

The Court: Overruled.

A. The net income would be $7,783.80.

Q. (By Mr. Rehm) And the adjusted gross income was $8,964.30? A. That's correct.

Q. And the statutory deductions were how much, sir?

A. $1,180.50.

Q. Now, Mr. Scherer, assuming that individual whose residence is in the City of St. Louis, and who is employed in the City of St. Louis, Missouri, and whose regular accounting period was on the basis of a calendar year, and assuming that such individual derived and received an adjusted gross income of $8,964.30, and further assuming that such individual was entitled to and allowed by the provisions of the Revenue Act of the United States statutory deductions in the amount of $1,180.50, and further assuming that the individual was a married man with two dependents other than himself and his wife, and further assuming that the taxable adjusted net income for such individual for the calendar year beginning January 1, 1952, and ending December 31, 1952, was $7,783.80, and further assuming that such individual filed a personal tax return, what amount of income tax would you say such individual owed and should have paid the government for that calendar year?

Mr. Hennelly: The defendant will object, if Your Honor please, it is a hypothetical question, assumes certain facts which are not in evidence, does not assume all of the necessary facts to arrive at such a conclusion, that there is nothing within the evidence or within the hypothetical question upon which this witness can base a proper legal conclusion, and for the reason that it is assuming that the elements which have been described to the witness were in fact income where as a matter of fact, that is an invasion of the province of the Jury.

The Court: Overruled.

A. The tax would be $1,228.42.

Q. (By Mr. Rehm) Directing your attention to Exhibit 1-C, the '52 return, what is reported on that return as defendant's income tax for the year 1952? A. $691.42.

Q. I show you what has previously been identified as Plaintiff's Exhibit 1-D, which is the return of the Defendant for the year 1953, sir, and ask you if you have seen Government's Exhibit 1-D before. A. I have.

Q. Was that one of the returns of the defendant that was assigned to you for audit? A. It was.

Q. I show you Plaintiff's Exhibit 6-J, a check from Schmidt Painting Company, dated April 7, '53, payable to the order of Louis Berra, in the amount of $400. I ask you, sir, if this Exhibit 6-J was included in the defendant's tax return for the year $1953, Exhibit 1-D?

Mr. Hennelly: Defendant will object to such testimony, if Your Honor please, and may that objection go to this entire line of checks, for the reason a proper foundation has not been laid for such testimony.

The Court: I think you should proceed on this year like you did the other two years. What income does the tax return show as verified by the record?

Mr. Rehm: There is no L. H. I. payment in the return. It has been stipulated he received the amount as shown from 688 as shown in the return, that's been stipulated. 688, sir.

The Court: The books of L. H. I. don't show it?

Mr. Rehm: He reports no income for L. H. I. that year.

The Court: Did he examine the books of—what union is it?

Mr. Rehm: 688, sir.

The Court: Did he examine the books?

Mr. Rehm: No, sir, but they have stipulated that the payments as per this return, were in fact paid by 688 to the defendant, sir, that's the reason.

The Court: What income does the return show?

Mr. Rehm: Expenses, just wages from Union 688, nothing from L. H. I. on the return.

The Court: The check you are now asking him about is from——

Mr. Hehm: L. H. I., sir.

The Court: I think your question should be is there an entry in the income tax return of that sum from L. H. I.

Mr. Rehm: All right, sir.
This check is actually from Schmidt, sir.

The Court: To the defendant?

Mr. Rehm: That's right, sir.

The Court: Very well, income from that source for that amount shown on the return I think is the propor question.

Mr. Rehm: All right. I will rephrase the question.

Q. (By Mr. Rehm). I show you Government's Exhibit 6-J, and ask you sir if there is an entry on that exhibit on defendant's return for the year 1953?

Mr. Hennelly: I object to that, if Your Honor please, a proper foundation has not been laid.

The Court: I think you should ask him—offer the exhibit in evidence, it has been offered and I received it—is there an item on the return of the amount of the check from the Witness Schmidt rather than ask him the conclusion, if that exhibit shows.

Q. (By Mr. Rehm) I ask you is there an item on the return referring to this exhibit, sir?

A. There is not.

The Court: What's the amount?

Mr. Rehm: $400, sir.

The Court: What's the date of the check?

Mr. Rehm: April 7, '53.

Mr. Hennelly: Excuse me. May the objection go to this entire line of testimony with respect to the checks for the reason a proper foundation has not been laid for this type of question under the circumstances.

The Court: Overruled.

Q. (By Mr. Rehm) Sir, I show you Plaintiff's Exhibit 6-K, a check dated April 20, 1953, from Schmidt Painting Company, payable to cash in the amount of $100, and ask you, sir, if there is an item in the return for this amount from that source? A. No, there is not.

Q. I show you Exhibit 6-L, a check from Schmidt Painting Company, dated May 15, '53, payable to cash, in the amount of $200, and I ask you sir if there is an item entered in the return showing the receipt in this amount from that source? A. No, there is not.

Q. I show you Exhibit 6-M, a check dated June 19, '53, payable to the order of cash from the Schmidt Painting Company, in the amount of $200. I ask you, sir, if there is an item in the return referring to that source or that amount? A. No, there is not.

Q. Now, sir, I ask you if you made a total of——

Mr. Rehm: Your Honor, at this time I would like to offer in evidence Plaintiff's Exhibits 6-A, K, L, and M.

The Court: They will be received.

(The documents marked Plaintiff's Exhibits 6-A, K, L, and M, respectively, were received in evidence.)

Q. (By Mr. Rehm) I ask you, sir, if you made a total of the Exhibits from 6-J, K, L, and M.

A. I made a total.

Q. What was that total, sir? A. $900.

Q. Directing your attention to page 3, line 1, of the return for the year 1953, I ask you, sir, if you will state what the defendant has entered there as an adjusted gross income.
A. $6,280.

The Court: What's the source of the income as shown by the return?

Mr. Rehm: Yes, sir.

Q. (By Mr. Rehm) Will you refer to the return and show what source or sources of income the defendant reports in the 1953 return, sir?
A. Salary from Local Union 688, $6,280; reimbursed expenses from Local 688, $1,786, less actual expenses $1,786, adjusted gross income $6,280.
Q. That's the adjusted gross income?
A. That is the adjusted gross income.
Q. Sir, did you total the adjusted gross income per the return and added that total to the exhibits that had been entered from Schmidt, F, J, K, L, and M? A. I did.
Q. And what was that total, sir? A. $7,180.
Q. Sir, assuming that these Exhibits 6-J, K, L, and M represented income to the defendant, what would his adjusted gross income be, sir?

Mr. Hennelly: I object to the form of the question, if Your Honor please, it is assuming certain facts which are not in evidence, and it is irrelevant and immaterial under the circumstances.

The Court: Overruled.

The Witness: Would you repeat that, please?

The Witness: Will you read the question back, please?

The Court: Assume that this sum of $900 was in fact income, what would his adjusted gross income have been for the year 1953? A. $7,180.

Q. (By Mr. Rehm) What does the defendant have entered on page 3, item 2, sir, statutory deductions?
A. $986.66.
Q. What does he have entered as net income, sir, line 3?

A. $5,293.34.

Q. Sir, assuming that Exhibits 6-J, K, L, and M represented income to the defendant for the year 1953, what should the net income be, sir? A. $6,193.34.

Q. So we have the adjusted gross income of $7,180?

A. That is correct.

Q. And statutory deductions $986.66? A. That is correct.

Q. And net, sir? A. Of $6,193.34?

Mr. Hennelly: I object to the form of the question, and ask that the answer be stricken, if Your Honor please.

The Court: Overruled.

Q. (By Mr. Rehm) Mr. Scherer, assuming that the individual whose residence is in the City of St. Louis, who is employed in the City of St. Louis, Missouri, and whose regular accounting period was on the basis of a calendar year, and assuming that such individual derived and received an adjusted gross income of $7,180, and further assuming that such individual was entitled to and allowed by the provisions of the Revenue Act of the United States statutory deductions in the amount of $960.66 and further assuming that the individual is a married man with two dependants other than himself and his wife, and further assuming that his taxable adjusted net income for such individual for the calendar year beginning January 1, 1953, and ending December 31, 1953, was $6,193.34, and further assuming that such individual filed a personal income tax return, what amount of income tax would you say such individual owed and should have paid the government for that calendar year?

Mr. Hennelly: I object, if Your Honor please, for the reason that the hypothetical question assumes certain facts which are not in evidence, does not assume the necessary facts upon which this witness can base a legal conclusion, and for the reason that the hypothetical question assumes that the figures which are mentioned to the witness are income, where, as a matter of fact, that is an invasion of the province of the Jury. There has been no evidence upon which such a conclusion could be based within the framework of the question.

The Court: Overruled.

A. Did you say he had two exemptions?

Q. (By Mr. Rehm) I mean to correct that. I think the return showed for that year he had only one dependent. I will rephrase the question with the exception that assume that he had one dependent other than himself and his wife.

Mr. Hennelly: For the purpose of the question——

Mr. Rehm: You have no objection?

Mr. Hennelly: May the record show that we are making the same objection, Your Honor?

The Court: Same ruling.

The tax as corrected would be $984.76.

I know Mr. Schmidt. On April 14th, I gave Mr. Schmidt a Grand Jury subpoena, that is April 14th of 1954. I gave it to him approximately 5:00 p. m. in the evening. He came down to the Federal Building here with me in his own automobile. We followed him down in ours.

Cross-Examination, by Mr. Hennelly.

In the course of my investigation of this matter, I interviewed and met Mr. Schmidt. I first met Mr. Schmidt approximately around March 18 at the L. H. I. That was the first time that I had seen Mr. Schmidt. Mr. Schmidt's returns have not been given to me for examination. I have never been at the Cook Paint Company checking on Mr. Schmidt's returns. I do not presently know whether, as a result of this investigation, there is presently pending an investigation of Schmidt's returns. This exhibit which has been shown to me as Government's Exhibit 6-A and which reflects a gross income for Mr. Schmidt in the amount of $10,387.64, for the year 1951, has not been given to me for any investigation of that figure. No one has worked with me in the investigation of Mr. Berra's return. Internal Revenue Agent Brown worked with me while we were working on the St. Louis Labor Health Institute and he may have done some work with respect to Mr. Berra, but he did not work with me as such. As a result of my investigation, Mr. Berra's position over at the L. H. I. I determined that it was within the scope of his authority

to okay expenditures over at the L. H. I. We also determined that he was in charge of the bank account and that he was the one who signed the checks and that they were counter-signed by a Mr. Saffo. In reaching my conclusions in answering Mr. Rehm, with respect to the income tax return for the year 1951 and the income tax liability, it was necessary for me to assume that the bills sent out by the Herchert Contracting Company were in fact income and, if it was either a loan or that bill had been paid, if that Herchert Contracting bill had been paid by Mr. Berra himself, that would not be income and would not be properly income, and would not be income for that year 1951, and I wouldn't include that in my computation as to what the tax was for that year 1951. In addition to the figures from the Herchert Contracting Company, which I used in arriving at the differences in the income tax return by Mr. Berra's return I used the figure of $2,000.00 from Mr. John F. Schmidt. There are no checks in evidence for that year showing receipt of that money and my computation with respect to that figure of $2,000.00 is necessarily based upon the fact that it was income. If these $2,000.00 were a loan, it could not be properly included as income. If the bill from the Herchert Contracting Company had been paid by Mr. Berra, himself, and if the amount of $2,000.00 was a loan to Mr. Berra, then Mr. Berra's income tax return was accurate for the year 1951. I indicated that there was $2,269.30 of additional income unreported for the year 1952. I included in that amount the check which was later turned over to the Singer Sewing Machine Company. I included that as income. It would make some difference in my computation if that was a gift. If all these checks were loans, it would make a difference. If they were loans, then Mr. Berra's income tax return for 1952 would be accurate. In 1953, the additional amount of unreported income based upon the hypothetical question was $900.00, and if the $900.00 which are represented by checks, which have been introduced here in evidence as going from Mr. Schmidt to Mr. Berra, if those checks were in fact loans and a part of which had even been paid back, then it would not properly be income. During the course of this examination of Mr. Berra's return, I interviewed Mr. Schmidt. I took an affidavit from him. I took that affidavit from him on March

25, 1954. I can identify and recognize what has been marked as Defendant's Exhibit M, as an affidavit taken by me from Mr. Schmidt, properly subscribed and sworn to on the 25th day of March, 1954. He swore to it. At that time Mr. Schmidt told me that everything that was billed against the L. H. I. was for work actually done, and that is incorporated in the affidavit to which he swore under oath on the 25th day of March. (Defendant's Exhibit M reads as follows: "United States of America, Eastern Judicial District, ss: Affidavit: I, John F. Schmidt, being of sound mind and lawful age do hereby depose and swear upon my oath that all invoices rendered by me to St. Louis Labor Health Institute was for work actually performed at Labor Health Institute, 1127 Pine St., St. Louis, Mo. Any work performed by me for officers of St. Louis Labor Health Institute was invoiced directly to them. If any of the officers' work was paid for by St. Louis Labor Health Institute it is without my knowledge. Signed by me this 25th day of March, 1954, of my own free will. /s/ John F. Schmidt. Subscribed and sworn to this 25th day of March, 1954. /s/ George F. Scherer, I. R. A.")

Redirect Examination, by Mr. Rehm.

Mr. Berra's returns were filed on a cash basis. The tax liability is assessed on the calendar year, this particular instance from January 1 through December 31, whatever year the return is filed. I checked the records of J. Shulman and Company. The last date I checked their records was March of 1954. I did not check the records of Herchert and Company. I checked the records of the L. H. I. The last time I checked the records of the L. H. I. was approximately in April, 1954. Upon the examination of the records of either of these two companies, I did not find any evidence that Mr. Berra had paid the bills represented in Exhibits 4-A and 4-K.

Recross-Examination, by Mr. Hennelly.

Assuming that the Herchert Contracting Company bill was due and owing and was not income, the fact that it was not paid in 1951, but at some later date would not make it income. Thereupon, the witness Scherer was excused.

The Government offered into evidence the following exhibits, which were accepted. Exhibits 2-E, 2-F and 2-G, which are Schmidt billings to the L. H. I. Plaintiff's Exhibit 8-A, which is a ledger sheet showing deposits and withdrawals of the John F. Schmidt Painting Company at the Mound City Trust Company. Plaintiff's Exhibits 7-A to 7-J and Plaintiff's Exhibits 3-A and 3-B, which are the Herchert Contracting Company copies of the bills to J. Shulman for the work done at 3120 Hampton. Also, the Government offered and there was received into evidence Government's Exhibits 6-N, 6-O and 6-P (Government's Exhibit 6-N is a check drawn through the account of the Labor Health Institute, 1127 Pine, St. Louis 1, Missouri, entitled building and alteration account. It is dated October 23, 1951. Its number is T165, payable to the order of John F. Schmidt in the amount of $705.65, drawn on the Tower Grove Bank & Trust Company, St. Louis, Missouri, signed by Lou Berra and counter-signed by Pete Saffo. It is endorsed on the back by John F. Schmidt and by Thies Service. Government's Exhibit 6-O is a check of the Labor Health Institute dated October 29, 1951, No. 2-171 paid to the order of John F. Schmidt, drawn on the Tower Grove Bank and Trust Company, St. Louis, Missouri, signed by Lou Berra, countersigned by Pete Saffo, in the amount of $838.21, endorsed on the back, John F. Schmidt and Thies Service Station and Jean Thies. Government's Exhibit 6-P is a check of the Labor Health Institute drawn on its account at Tower Grove Bank and Trust Company, payable to the order of John F. Schmidt, No. T-180 in the amount of $676.00, dated November 7, 1951, signed by Lou Berra and counter-signed by Pete Saffo, endorsed on the back, F. Schmidt).

The Government then rested its case. At the close of the Plaintiff's case, the defendant by his counsel, filed with the court his motions for judgment of acquittal in writing, in words and figures, as follows, and same were thereby overruled.

At the close of the Plaintiff's case, the defendant, by his counsel, offered and filed with the Court his motions for judgment of acquittal, in writing, in words and figures, as follows, to-wit:

"United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America, Plaintiff,

vs.

Lou Berra, Defendant.

No. 27857 (2).

Motion for Judgment of Acquittal.

Comes now the defendant in the above captioned matter and moves for a judgment of acquittal on both Counts, and for good cause of said motion states:

1. The proof and evidence has failed to show that the witness Schmidt was under subpoena to testify before the federal grand jury on or at February 21, 22, or 23, 1954, or that the witness Schmidt on said dates desired to testify, intended to testify or had agreed to testify at the government's request before said grand jury.

2. The proof and evidence has failed to show that said Schmidt was a witness before said grand jury within the scope and purview of Section 1503, Title 18, U. C. C., on said dates in February of 1954.

3. The proof and evidence has failed to show that the witness Schmidt was under subpoena to testify before the federal grand jury on or at April 13 and 14, 1954, or that the witness Schmidt on said dates desired to testify; intended to testify or had agreed to testify at the government's request before said grand jury.

4. The proof and evidence has failed to show that said Schmidt was a witness before said grand jury within the

scope and purview of Section 1503, Title 18, U. S. C., on said dates in April of 1954.

Respectfully submitted,

(Signed) MARK M. HENNELLY,
MARK M. HENNELLY,
(Signed) STANLEY M. ROSENBLUM,
STANLEY M. ROSENBLUM,
Attorneys for Defendant."

Which said motion was by the Court marked "Refused. R. M. H."

"United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,
vs.
No. 27866 (2).
Louis (Lou) Berra,
Defendant.

Motion for Judgment of Acquittal.

Comes now the defendant in the above captioned matter and moves for a judgment of acquittal on each of said Counts and for good cause of said motion states:

I. With respect to Count I

(a) There is no substantial evidence that this defendant knowingly, wilfully, and intentionally filed an individual tax return for the calendar year 1951 in which he knowingly and intentionally understated his net income for the year.

(b) The alleged understatements of income arising out of payments by the St. Louis Labor Health Institute to J. Shulman & Sons and Melcher-Schene Hardware Co. is

based purely on circumstantial evidence not excluding every hypothesis of innocence in that in neither case is there any showing that defendant Berra knew of said payments by the L. H. I. on his behalf or account to said J. Shulman & Sons and Melcher-Schene Hardware Co. so that on the circumstantial evidence adduced the hypothesis of mistaken payment by the L. H. I. without his knowledge is as permissible as is the inference of intentional payment by the L. H. I. with defendant's knowledge or connivance.

(c) The monies allegedly received from John Schmidt in said year 1951 are not taxable income to defendant and he was not required to report same; likewise, even if the evidence were to show that the payments by the L. H. I. to J. Shulman & Sons and Melcher-Schene Hardware Co. were made with defendant's knowledge and connivance, said payments were not taxable income and defendant was not required to report same on his income tax return for 1951 because

1) Said monies were embezzled by defendant from said L. H. I. in his official capacity as business manager.

2) Defendant was under an immediate and unqualified obligation to repay said misappropriated monies at the time of their felonious taking.

3) Defendant had void title to said monies and no affirmative action remained to be taken by said L. H. I. to effectuate his legal obligation to repay said embezzled funds.

(d) There is not sufficient evidence to show any intent on the part of the defendant to file a false and fraudulent tax return for the year 1951 or to evade a substantial amount of income tax due the Government.

2. With respect to Count II

a) There is no substantial evidence that this defendant knowingly, wilfully, and intentionally filed an individual tax return for the calendar year 1952 in which he knowingly and intentionally understated his net income for the year.

b) The monies received from John Schmidt in said year 1952 are not taxable to defendant and he was not required to report same because

1) Said monies were embezzled by defendant from said L. H. I. in his official capacity as business manager.

2) Defendant was under an immediate and unqualified obligation to repay said misappropriated monies at the time of their felonious taking.

3) Defendant had void title to said monies and no affirmative action remained to be taken by said L. H. I. to effectuate his legal obligation to repay said embezzled funds.

c) There is not sufficient evidence to show any intent on the part of the defendant to file a false and fraudulent tax return for the year 1952 or to evade a substantial amount of income tax due the Government.

3. With respect to Count III

a) There is no substantial evidence that this defendant knowingly, wilfully, and intentionally filed an individual tax return for the calendar year 1953 in which he knowingly and intentionally understated his net income for the year.

b) The monies received from John Schmidt in said year 1953 are not taxable to defendant and he was not required to report same because

1) Said monies were embezzled by defendant from said L. H. I. in his official capacity as business manager.

2) Defendant was under an immediate and unqualified obligation to repay said misappropriated monies at the time of their felonious taking.

3) Defendant had void title to said monies and no affirmative action remained to be taken by said L. H. I. to effectuate his legal obligation to repay said embezzled funds.

c) There is not sufficient evidence to show any intent on the part of the defendant to file a false and fraudulent

tax return for the year 1953 or to evade a substantial amount of income tax due the Government.

Respectfully submitted,

(Signed) MARK M. HENNELLY,
MARK M. HENNELLY,
(Signed) STANLEY M. ROSENBLUM,
STANLEY M. ROSENBLUM,
Attorneys for Defendant."

HAROLD J. GIBBONS testified for the defendant as follows:

Direct Examination, by Mr. Hennelly.

My name is Harold J. Gibbons. I know the defendant Louis Berra. During the year 1951, Mr. Berra was the business manager of the L. H. I. His duties as business manager were largely to assist me in the carrying out of business operations of the Medical Center. Yes, I was his boss. I am President of the Labor Health Institute and as such am really the top administrative person. Mr. Berra has had little, if anything, to do with the letting of any contracts. He may have sat in on some conferences with the medical director and myself when we initially discussed the idea of changes. He may have sat in with the architect and the medical director and myself when we discussed the nature of the changes, details of the changes, and he would be contributing, if anything, largely to the matter of could the budget stand it, how we are fixed financially, and so on. The actual contractors, the letting of contracts, was solely and exclusively my occupation. On the administrative level Mr. Berra is not a member of any group which would have any authority over contracts. I believe during the period he may have been a member of the Board of Directors, Board of Trustees, but administratively he would have nothing to do with the letting of a contract. To my knowledge he had nothing to do with the letting of the contracts to the Shulman Company, unless of the more casual relationships to the whole problem. He, at no point, had any responsibility in connection with the letting of contracts, the de-

termination of who would have the contracts, or what the contracts would be. If he gave any contracts to the Shulman Company, he would have been violating his job function. To my knowledge he had nothing at all to do with the letting of the contracts to Mr. Schmidt. All contracts were let in the same fashion in our operation. With respect to his other duties he did have authority to okay expenditures. He signed checks among other things, he would okay the payrolls and they would come to him. He would okay the payroll of the entire Labor Health Institute. I am only talking about the paid employees of the Labor Health Institute, not any of the contractors' payrolls. He would also okay invoices that were to be paid, he would check them. He had the responsibility to prepare for that.

Cross-Examination, by Mr. Rehm.

Business Manager of L. H. I. was largely a job title; his function was largely that of an administrative assistant to me. I have from the inception of the L. H. I. been the chief administrative officer, I have made all the decisions in connection with it, and I have delegated certain responsibilities to individuals and assigned the employees in various capacities. The administrative assistant was to take on those functions which I delegated to him in addition to certain routine, minor functions The biggest contribution that Mr. Berra made was in the field of budget, his biggest and most important contribution to the affair of the Labor Health Institute dealt with budget. I can identify a series of invoices or weekly statements from J. Shulman and Sons, and I see that there is an "O. K. Lou" on each of these invoices, and that is Mr. Berra's signature on the invoices. He had been associated with me for thirteen years. The "O. K. Lou" on there was that he was giving the okay for Miss White, who is the one who actually wrote the checks. In other words he had the position that if there was a bill that came in from J. Shulman and he put his okay on it, then Miss White wrote the check or typed it and she would have the authority without any further authority to issue the check and secure the signature of Mr. Berra and the counter-signature of Mr. Saffo on the check. Mr. Saffo, during this period, was the secretary of the L. H. I. All

the exhibits in Government's Exhibits 2-D have been okayed by Mr. Berra. The "O. K. Lou" on Government Exhibit 2-F appears to be a rubber stamp. As to Berra, he in the usual course of business would put his O. K. for payment on the invoice and that would mean that Miss White could write checks. It is apparent that he had a rubber stamp by which he could put the okay on these invoices. I am the secretary-treasurer of Local 688. That is one of my duties and I am also president of the Labor Health Institute. My business in the position that I hold requires that I be out of town. They require that I be away from my office on Pine Street., However, if I am out of the city, I am very close to the office by long distance telephone calls. My office over there is on the second floor and I have one on the first floor. During 1951, he had an office in the building, I am not sure where his office was located during this time. I am testifying that to my own personal knowledge, Mr. Berra never had any authority to hire Mr. Schmidt to do any painting at the L. H. I.'s offices. Whether he did it or not I wouldn't be able to testify. I was not alongside Lou Berra twenty-four hours a day. After these bills were okayed by Mr. Berra, these bills would be put on file. Checks would be issued and at regular intervals I received reports, summaries of the status of the work being done, and so on, how close we were coming out to the amount of the bids. Mr. Berra was not responsible for compiling these status reports. I would get my reports from the files of the financial office. I would get reports on the progress work from the medical director and from the architect or from the superintendent of building and would make tours of inspection myself to watch the progress of the work. Everytime we wanted some painting done I had a consultation with my medical director and requisitions and requests for the painting was made to me and I was consulted on every single quarter that was spent over there so far as new construction was concerned. During 1951, 1952, and 1953, there were written contracts with Mr. Schmidt. They were let on the basis of bidding. Sometimes a higher bid might be taken if facts involved justify it. The number of coats of paint was important. If one bid was over against another bid we might offer it, but certainly as a result of examination, discussion and evaluation. As far as I know John Schmidt

and Company was the only one who did any painting over at the L. H. I. in the years 1951 and 1952, but I am not certain. It is not because Mr. Berra handled the matters that I don't remember. Mr. Berra did not handle the matters with Mr. Schmidt or any other contractor in that building. I did not hear Mr. Weber testify that Mr. Berra had authority to authorize this work. I did not delegate the authority to let contracts, or the okaying of contracts to anyone. That's a responsibility that I kept to myself and it is one which I cannot delegate. I did not keep my finger on every job and actually check the number of hours that was worked and the work that was done. I delegated that part of the responsibility to Lou Berra during the years that he was business manager. He did that kind of checking. My architect assumed part of that probably as well as the medical director. Mr. Berra is still in the employment of Local 688, still being paid by Local 688. I am not personally paying any of the expenses for Mr. Berra's defense. Local 688, if there has been any expenses paid, would be the party that would pay it. Local 688 is paying the expenses of this defense.

Q. Did L. H. I. at any time pay or make any payment relative to the defense of Mr. Berra in this case?

A. I don't believe so.

Q. Do you know sir?

A. I do not know of it if they have paid a penny toward his defense.

Q. What is your position with that organization, sir?

A. L. H. I.?

Q. Yes.

A. I am the president, chief administrative officer.

Q. Certainly for something like that wouldn't they have to get your authority?

A. I am quite sure they would get my authority.

Q. You are not telling us definitely they did not?

A. As of right now, the very best of my knowledge, I think I am pretty accurate on it, they have not.

Q. I ask you sir, if you know whether or not a check was issued from L. H. I., for that purpose?

Mr. Hennelly: Your Honor, I am going to object; this has gone far afield. I think it irrelevant and immaterial, won't tend to prove or disprove any issue in the case.

The Court: All right. Overruled. You may answer.

The Witness: I may answer?

The Court: Yes.

A. I believe a check was issued.

Mr. Rehm: No further questions.

Redirect Examination, by Mr. Hennelly.

A check was issued to the attorney by the Labor Health Institute in error, and immediately the attorney was contacted, a request for the check to be returned, which was done, and as we have in all such matters, we consult with our attorneys to get legal opinions on our right to pay those things. That was in violation of orders, was issued in error, and was immediately corrected. No money has come out of the L. H. I. for the defense of this case.

Q. I believe you have indicated that 688 is going or has made some payment for the defense of this case. Tell the Court and Jury why 688 is going to pay for the defense of Lou Berra in this case.

Mr. Rehm: I object to that as giving this witness a field——

The Court: Sustained.

WALDO TAYLOR testified as follows:

Direct Examination, by Mr. Hennelly.

My name is Waldo A. Taylor. I live at 4949 Parker. I am credit manager for Cook Paint and Varnish Company. Mr. Schmidt is one of the customers of the Cook Paint and Varnish Company. During the year 1954, a person called me who said he was from the Internal Revenue Department. Someone later got on the phone who represented himself as Mr. Schmidt. I had a conversation with that person who said he was Mr. Schmidt. He said that they were investigating his income tax returns, that is Mr. Schmidt's. He also said I should give the Internal Revenue Department anything they wanted. I don't remember the exact date

that this was done. Later some men from the Internal Revenue Departm t came to see me, a Mr. Brown, and he took some of my records. He left a receipt for them. I have that receipt with me. I can identify what has been marked for purposes of identification as Defendant's Exhibit O. It is a receipt for two invoices given by me to Mr. Brown, covering merchandise charged to Mr. Schmidt during the year 1952. At that time Mr. Brown was by himself and I gave him the receipt personally and it is kept within the records of the Cook Paint and Varnish Company and within the normal course of business. At one time I had a conversation with Mr. Scherer of the the Internal Revenue Department. He called me on the phone. He was the one who made the original call. That's when Mr. Schmidt told me he was under investigation.

Cross-Examination, by Mr. Rehm.

I can identify what has been marked as Government's Exhibits 9-A and 9-B. They are a copy of Cook Paint and Varnish Company, photostatic copies of merchandise charged to Mr. John F. Schmidt. They have a reference to Defendant's Exhibit O. The numbers on these invoices are the same as those referred to in Defendant's Exhibit O. From looking at Government's Exhibit 9-B, I can tell that the material was shipped and delivered to 3120 Hampton Avenue. When the Internal Revenue Agent came down to me and questioned me, I was questioned only concerning those business transactions relating to 3120 Hampton, not all of Mr. Schmidt's business, just Mr. Schmidt's business at this one address.

Redirect Examination, by Mr. Hennelly.

I was told that Mr. John Schmidt was under investigation by the Internal Revenue Department.

Recross-Examination, by Mr. Rehm.

Yes, a representative of the Bureau of Internal Revenue did tell me that Mr. Schmidt was under investigation. Mr. Scherer told me on the phone and Mr. Brown came to the office. They told me that Schmidt was under investigation.

AL SHULMAN testified as follows:

Direct Examination, by Mr. Hennelly.

My name is Al Shulman and I live at 8217 Appleton Drive. I am superintendent and foreman for J. Shulman and Sons Construction Company; the members of that company are Mr. Julius Shulman, Jack Shulman, Harry Shulman, Al Shulman and Eddie Shulman, all of whom are brothers, except my dad, Julius. I have been subpoenaed by the defendant in this case and was also subpoenaed by the Government. Our company has been doing work for the L. H. I. on Pine Street since 1949. At no time from 1949 up until the time of this indictment did Lou Berra, the defendant in this case, ever ask me for any kind of a kickback or any money from our company for working at L. H. I.; I never offered him any money and he never offered me anything. Some work was done for Mr. Berra at his house, but I was never advised by Mr. Berra to bill that against the L. H. I. It was our understanding at that time that Mr. Berra was to personally pay for the work; that was an arrangement between me and Mr. Berra, himself. My carpenters were out at Mr. Berra's house one time; I am in charge of the carpentry section of the business, while my brother, Harry, is more or less of a superintendent on the job. Five days' work was done at Mr. Berra's house, all of which has been paid. This was paid by Lou Berra, about a month ago or five weeks ago. Defendant's Exhibit N is a letter which I consulted Mr. Agatstein about. Lou Berra gave me a check for $1,577.38 for work done at his house, after which I went up to see Mr. Agatstein, my lawyer. After consulting with him, I went back to the office and made out a check to the Labor Health Institute and gave it to the business manager of that organization. Mr. Berra never told me or anyone else to my knowledge to render fictitious or padded invoices to the L. H. I. Two months after the completion of the job at his house, he asked me for a bill for that work and I just told him to forget about it. Not exactly to forget about it, but wait till I got to it.

Cross-Examination, by Mr. Rehm.

I know nothing about Exhibit 4-A, a bill from Herchert Construction Company to J. Shulman for $412.00. I did not see this bill until the time of the Grand Jury. I do know that work was being done at Mr. Berra's home because I saw the men working there at the time. I did not go out there when the job started, but evidently my brother, Harry Shulman, did. No, I know nothing about that bill. J. Shulman paid that bill to Mr. Herchert, and was repaid by billing L. H. I. for the $412.00. This is not billed at one time in the full amount. It was not billed as concrete work at Berra's home; instead, it was billed as labor performed at L. H. I. It appears that the bill was paid as a result of padding a number of hours of work performed each week for L. H. I. until the full amount of $412.00 had been paid, but I do not know where or why that was done. I have no knowledge whatsoever about that transaction.

Cross-Examination, by the Court.

The girls in the office have charge of the books and records of our company. There are four of us in the company who would have charge of telling the girls to make out the bills to the L. H. I. I had nothing to do with this one, and I don't know who did. No, I never asked the girl why L. H. I. was billed in this matter, and I didn't know anything about this until we saw that in the Grand Jury. When Lou Berra asked me to give him a bill, I didn't give it to him because it slipped my mind. I sent that check to L. H. I. because we had wrongfully billed them before, when the bill should have been sent to Mr. Lou Berra. When I got this check from Lou Berra about a month ago, I went to my lawyer and told him that we had wrongfully billed the L. H. I. when we should have billed Lou Berra. I discovered that we had made this wrongful billing, during the Grand Jury indictment when they called us up and Mr. Goldschein called me up there in the office. I imagine that was about six or eight months ago.

Cross-Examination, by Mr. Rehm.

No, I know absolutely nothing about the concrete work, Exhibit 4-A, and this billing on down to 4-L. No, I know nothing about any arrangements with Berra, about the

payment, or nothing about the billing. Exhibit 4-K is another concrete bill that I know absolutely nothing about; I do not know who paid it, or whether Shulman ever paid Herchert. I heard of that for the first time during the testimony here. I knew about the work but I sure did not know how it was paid. On Defendant's Exhibit N, that is my signature at the bottom of that letter. That letter does state: "Labor Health Institute, September 2, 1954, Gentlemen: We are enclosing herewith our check for $1,577.38 as a refund to you of payment made to us in connection with work that we completed on the residence of Mr. Louis Berra, at 3120 Hampton." Yes, that amount of $1,577.38 does include these two items. Yes, the last sentence of the first paragraph of that letter also says, "We assume that any payment you made us would be compensated by Mr. Berra." I did not read that letter plainly, Mr. Agatstein wrote the letter. Yes, I wrote that letter, but I did not pad these bills. No, as I stated on direct examination, Mr. Berra did not know of this billing to the L. H. I. Yes, Mr. Berra did ask me for the bills for his work but he never told us to bill it to L. H. I. Yes, it is true that the payment to me from Mr. Berra, and my payment back to L. H. I. was the result of the Grand Jury investigation. I knew nothing about the concrete bills and how they were billed, but they were included in the check to L. H. I. last month. I did not send the bills to Mr. Berra because all I had in my mind was Labor Health. We worked down there for five years, and all I had in my mind was Labor Health Institute. Mr. Berra never told us to charge anything to them, or to bill them. The entire matter was just a fault on our company of charging it to the L. H. I.

Cross-Examination, by the Court.

Our firm is a partnership.

Cross-Examination, by Mr. Rehm.

Yes, we did work out at Mr. Berra's house and automatically billed L. H. I.; we were hired by Mr. Berra, and he was the one to call us to do the work. We sent the bills for this job to L. H. I., but without any knowledge of Berra at all; he never told us to bill it that way.

Cross-Examination, by the Court.

We didn't send the bill to the L. H. I. for the actual character of work we were doing instead of changing it to an hour-labor charge because we just didn't think about it at the time. In regard to the concrete work, I have no knowledge at all who did that billing, and changed it to hours when charging it to L. H. I. No, I can't think of any explanation at all to that concrete bill and I have no knowledge of it whatsoever. I do not know who would approve these bills when they got down to L. H. I. for payment; I had nothing to do with the collection of money.

Cross-Examination, by Mr. Rehm.

Yes, I thought all the time that Mr. Berra was going to pay for this work, and he had asked me several times for the bill. To my knowledge Mr. Berra hadn't paid anyone for this work. When he did want to pay me, I went to see a lawyer because that was during the indictment; I just wanted to see if it was the rightful thing before I put that check in the bank. This was all after the indictment had been returned, and Mr. Berra had been arrested. I never told Mr. Berra, "Forget about it" in regard to the bill, but I think I just told him that I would take care of it when I get to it. Yes, I picked up the materials on this invoice identified as a bill to Labor Health Institute, attention, Mr. Berra, for some oak wall plates, knotty pine and things like that. I took that material out to Mr. Berra's house at 3120 Hampton, but the bill went to Labor Health Institute. No one told them to bill it there, I billed it that way, myself. I picked up the lumber and I had it billed that way. I picked some material up at Melcher-Schene place to take out to Mr. Berra's home, and told them to bill L. H. I. for it also. The invoice labeled Exhibit 5-B, for knotty pine panelling to 3120 Hampton, signed by Mrs. Lou Berra from Melcher-Schene, is for material which went out there. I ordered it out there. The bill was sent to Labor Health Institute on my direction. This invoice in the amount of $56.78, for finishing, moldings and plates was billed to Labor Health Institute, but was delivered to 3120 Hampton. The reason that Labor Health was billed for this was because it was all I had in my mind, was Labor Health Institute at the time.

No, it's not the rightful thing that was done, that I admit. We did work for other firms also during that period of time, but I know of no instance where I did work at the house of the business manager or president or secretary's home and charged it to the corporation without directions or instructions from him (Objection by Mr. Hennelly to this last statement was sustained). I know of no other instances during the year 1951 where a mistake was made in billing. Exhibits 4-1-S to 4-5-S are for two carpenters at work at Lou Berra's house, all of which was charged to Labor Health Institute. 4-1-S shows Mertens, eight hours, and Becker and Harry, eight hours, all charged to Labor Health Institute. There is also a notation on there—"Berra's house." That was put on there by me after the indictment. When Mr. Goldschein told me to get the work-sheet for the work that was done out at the house. That was work actually done at Berra's house for five different days. The charges for these five days labor was billed to Labor Health Institute through the same error, since I just had Labor Health Institute in my mind.

Cross-Examination, by the Court.

It was about three years after the work was done that I went back and put the notation "Berra's home" on it. (Thereafter, following the noon recess before resumption of testimony the following took place within the presence of the jury.)

The Court: Mr. Hennelly, there appears to be a matter I want to make a complete record on. At the completion of the government's case you asked for the transcript of the testimony of the Witness Schmidt.

Mr. Hennelly: Yes, Your Honor.

The Court: I did not rule on it. You made the case and later you made some remarks for the court which are now in the record which I construed as withdrawal of your request.

Mr. Hennelly: That's correct. The record may show that you withdraw the request for the Grand Jury testimony of the Witness Schmidt.

The Court: Very well.
I thought the record ought to show that.
Proceed.

Cross-Examination, by Mr. Rehm.

The billings on this work that was done at Lou Berra's house was sent to the L. H. I. on my own initiative. This was a mistake of mine, they should have been sent to Mr. Berra's home. I have never given any statement contradictory to that. Yes, I testified before the Grand Jury. Before the Grand Jury, I testified that I knew the lumber wasn't going to Labor Health Institute and that I knew it was going to Lou Berra's home. If I made the statement before the Grand Jury that Mr. Berra told me to charge it to Labor Health Institute, it was because I was under pressure and excited and didn't know what I was saying. I cannot remember, before the Grand Jury, in answer to the question, "When did he tell you to charge it to Labor Health Institute?" stating the following, "At the time I got the material." I am not denying that I made that statement but I cannot remember it. I do not remember telling the Grand Jury of any conversation with Mr. Berra when I told him I would get lumber from one of the yards and charge it to the L. H. I. at his home address. I do not deny making that statement before the Grand Jury, but I cannot recall it. Under the pressure and excitement before the Grand Jury, certain words came out of my mouth and I just didn't know what I was saying at the time. There was more pressure on me there than at the present time. I do not recall telling the Grand Jury that the reason I did not bill Berra for the work in his basement was because it was difficult to keep separate from the work done at L. H. I. I do not deny making that statement, but I don't recall it. As a matter of fact, during the week that work was done at Lou Berra's house, we were not going back and forth to L. H. I. because all of the work was done at Berra's home itself. No, there would be no particular problem in bookkeeping in having the work billed to the right places even though we were working at both the L. H. I. and Berra's home. But I just sent all the bills down to the L. H. I. because that was all I had in my mind. I do not remember telling the Grand

Jury that Lou Berra told me to send the bill to the Labor Health Institute. Mr. Berra did not tell me to charge it to the L. H. I.; while I do not recall making that statement before the Grand Jury, if it is on there, it must have been said. Those words were put in my mouth under pressure at that time. I received this check from Mr. Berra for $1500 some odd dollars about three weeks ago. It was given to me personally by Lou Berra. I believe Mr. Latal was with him at the time. Mr. Berra told me that this was the check for work that I did out at his house that I wrongfully billed L. H. I. for. I had not sent him a bill prior to the time he gave me the check. I did prepare the bill after he had given me the check, and I made the bill for the amount of the check. Mr. Berra did not instruct me to mail a check to the L. H. I., I did that on my own.

Cross-Examination, by the Court.

When the defendant gave me this check all he said was, here's the money for the work wrongfully billed to the L. H. I. which should have been billed to him. That was the first time that he had ever discussed that check with me.

Cross-Examination, by Mr. Rehm.

Q. (By Mr. Rehm) Did J. Shulman and Sons do any work for other officials of L. H. I., sir, or 688? A. I did.

Q. I see. And was there any mistakes ever made in their billing, sir? A. No, sir.

Mr. Hennelly: I object, irrelevant and immaterial and beyond the scope of the examination.

The Court: Overruled.

Mr. Rehm: Sir, will you answer? A. No, sir.

The Court: Whom did you do work for L. H. I.?

The Witness: Harold Gibbons.

The Court: Who did you bill for that?

The Witness: Direct to him.

The Court: You mean to Harold Gibbons?

The Witness: Yes, sir. I sent, just the labor was done out there at his house, Herman Mertens worked out at his house. Yes, I billed Mr. Gibbons personally for the work done at his home. I fixed a step for Mr. Latal, but did not bill L. H. I. for that. I didn't bill anybody but just donated that service. I have never done any work for Pete Saffo.

Redirect Examination, by Mr. Hennelly.

I have had three years of high school education; I am forty-three years old. Before I went before the Grand Jury, I had been questioned by members of the District Attorney's office. No, there was no question raised at that time with respect to my income tax returns. Yes, I paid this money about three weeks ago—Mr. Berra paid me and then I paid the L. H. I. That all took place about three weeks ago. A copy of the letter I sent to the L. H. I. was sent to Mr. Rathert, the gentleman with the Internal Revenue Department. About a week before that time, my deposition had been taken by Stanley Rosenblum, the lawyer associated in the representation of Lou Berra. At that time, I told Mr. Rosenblum that I had wrongfully billed the L. H. I. for that amount. It was then for the first time that there was a discussion with respect as to whether or not it should be paid back. With respect to my Grand Jury testimony and the testimony here today, Mr. Berra never did tell me to submit bills to the L. H. I., and he never told me to pad any accounts in any way. No, he never instructed me in any way that I should not bill him and bill someone else. No, he did not make any demand upon me for any money in the form of either services or money or anything else. My brother and I have both been subpoenaed by the Government, and the defendant. At the present time my brother, Harry Shulman, is in Faith Hospital. The original contract between our company and L. H. I. was made by my brother, Jack Shulman. I did not have anything to do with that contract at all.

Redirect Examination, by Mr. Hennelly.

When I got the check from Mr. Berra, I went to the bank to see that it was cleared before I made out a check

and brought it down to the L. H. I. with this letter written by my lawyer.

Recross-Examination, by Mr. Rehm.

Yes, the check was wrongfully billed to the L. H. I., and L. H. I. wrongfully paid it to me. I had L. H. I. money that didn't belong to me. When I got Mr. Berra's check I went down to the bank to make sure it would clear. Whether it cleared or not, I still would have to give that check back to L. H. I.

NANCY DAVIS testified as follows:

Direct Examination, by Mr. Hennelly.

My name is Nancy Davis, I live at 4346 Page Boulevard. I work for Local 688, where I have been employed for ten or eleven years. I am acquainted with Mr. Schmidt, the painter, and I have seen him around Local 688 for about three years. My duties with Local 688 are cashier-clerk, and I accept dues and cash checks. Two people have the authority to cash checks there, Mr. Rower and myself. If a dues-paying member comes in with a check to be cashed, I can cash that on my own. If someone other than a dues-paying member comes in, I have to get an okay to cash their check from either Mr. Gibbons, Mr. Berra, or Mrs. Rower. Sometime during the last year I have cashed checks for Mr. Schmidt, the painter, I would say about three or four of them. I might know these checks if I saw them again. Of Government's Exhibits 6-L, M, N, G and K, I would say that three of those were checks that I cashed for Mr. Schmidt.

Cross-Examination, by Mr. Stanard.

I would say that I cashed three of these checks because my stamp is on three of them. That is a rubber stamp which has Warehouse and Distribution Workers, 1127 Pine, St. Louis, Missouri, on it. I have used that stamp for about ten years, as long as I have been employed there. There are only two stamps like this at 688. I have sole

custody of one, and Mrs. Rower has custody of the other. Only the two of us have access to these stamps. I keep mine in my desk drawer, which I keep locked. I know that it is my stamp on these three checks and not Mrs. Rower's because I made those bank deposits, and I remember cashing the checks of Smitty. No, there is no difference between my stamp and Mrs. Rower's. I only use the stamp once a day when I make up the deposits. At that time, I'd make about fifteen or twenty impressions. No, Mr. Berry does not have access to this stamp, Mr. Gibbons does not have access to this stamp. I have to get an okay from someone before I can cash a check for any non-dues paying member. I work in a cashier's cage; Mrs. Rower is my supervisor, and she has authority to approve the cashing of checks for non-members. I do not remember who approved the cashing of the three checks which I recognize today. I do not believe that any of the regular employees in our building are non-members of the union. I can generally determine whether or not I need approval to cash a check by looking at the check and seeing whether or not it is from a company I recognize. If a dues-paying member wants to cash a different type of check, other than a company check, I would need approval to cash it. I do not remember how many checks I cashed in 1953 that I needed approval on; it was very seldom that I cashed such checks. I remember cashing the checks for Smitty, but I can't remember anyone else for whom I cashed checks during that year. I remember cashing the checks for Smitty, but I can't say specifically whether or not it is those three.

Cross-Examination, by the Court.

I do not specifically remember cashing these three checks.

Redirect Examination, by Mr. Hennelly.

I remember cashing checks for Mr. Schmidt, but I cannot positively say whether they were these checks or some other checks. The checks I cashed for Mr. Schmidt were made out to cash. I used to see him every day in the building when he was working, and he would talk and converse with me.

AL SHULMAN, recalled, testified as follows:

Redirect Examination, by Mr. Hennelly.

Yes, I recall testifying before the Grand Jury in response to the question, "Who told you to charge the labor at Lou Berra's house to the Labor Health Institute," that nobody had told me, and that I took it upon myself to charge it to the L. H. I. I recall making that statement to the Grand Jury.

Recross-Examination, by Mr. Rehm.

Yes, I remember that question that Mr. Hennelly just read to me being asked me before the Grand Jury, and the answer I gave. I remember that faintly. As to the questions you (Mr. Rehm) asked me about, I could not remember some of those.

LOUIS BERRA, testified as follows:

Direct Examination, by Mr. Hennelly.

My name is Louis Berra. I am acquainted with Nancy Davis, the girl who testified before me. She works for Local 688 of the Teamsters' Union, and has been working there for approximately ten years. There are four people in Local 688 who have the authority to cash checks; Mr. Gibbons, Mr. Nabor, Mrs. Rower and myself. I have the authority to cash checks now, not exactly to cash them, but to okay them for payment. The actual cashing would be done by one of the two girls at the window. There are two girls at the window at the present time, Mrs. Davis and a new girl that we recently hired. The supervisor is Mrs. Rower. There are stamps over there by which the checks would be endorsed by Local 688, but I have no access to those stamps, and I don't know where they are. I have never in 15 years ever endorsed any check over there. I would say Mrs. Davis has had the authority to cash checks for about five to six years.

In August of 1951, I was employed as business manager for the St. Louis Labor Health Institute. As an administrative assistant to the president, I was responsible for

the non-professional supervision of the non-professional help, I approved the payroll, signed all checks, reported to the president bank balances monthly or weekly, and approved all expenditures. I had other duties which would be fully defined in the By-Laws. I had no authority whatsoever to let any contracts of any kind. At that time, Mr. Schmidt was working at the L. H. I., and had been for a couple of years. He came in sometime in 1949. In July or August of 1951, I had a conversation with him with respect to borrowing some money. On this occasion, when we were drinking coffee or eating down the street and discussing our personal gripes and problems, I mentioned about my boy just graduating from C. B. C. and scheduled to go to St. Louis University that fall and that I had recently bought a house with the sidewalk in need of repairs and needed repairs downstairs. At that time, Mr. Schmidt asked me about how much I would need and I told him I guess three or four thousand dollars. I had previously attempted to raise money from other sources, and reviewed the prospect of borrowing on a second deed of trust on my home. At this time, Mr. Schmidt told me that he would loan me three or four thousand dollars within the next several years, and that from time to time he would give me payments and would not charge me any interest. I later got a check from Mr. Schmidt in the amount of $650.00. It was about a week prior to August 20, when I had priced some furniture for my house at approximately $675.00. I mentioned this to Mr. Schmidt, who then told me that he would get it for me in a few days. On approximately August 20th, he gave me a check for $650.00, which I deposited in my account at the Plaza Bank. Several days later I drew a check for over $600.00 to pay for this furniture. The $650.00 check that Mr. Schmidt had given me was returned by the Plaza Bank for insufficient funds. Subsequently, in the year 1951, according to my records, I received a total of $1,925.00 from Mr. Schmidt. Yes, I did make the payments to him during 1951. Sometime in November of 1951, Mr. Schmidt informed me that he would like to have a few dollars and that he needed it pretty bad. Several days later I discussed the matter with a friend of mine, who then loaned me 6 one hundred dollar bills—that was on a Sunday morning. The following Monday I saw Smitty at the

Labor Health Institute and gave him the cash. I had informed him that I preferred to repay him by check, but he stated that he would prefer cash so that his wife would not know about it. No, I had no conversation of any kind with Mr. Schmidt with respect to any code numbers or anything that was to be placed on any invoice. The first time that I heard about that was in this court room. I had no conversation with him whatsoever with respect to padding any bills at the L. H. I. No, I never had any discussion with him during 1951 with respect to destroying any records, or instructing him not to keep any records. All but a few of the checks that I received from Mr. Schmidt are deposited at the Plaza Bank. Several of them I may have cashed somewhere else. In 1952, I received other checks from Mr. Schmidt in the amount of approximately $1900.00 or $2,000.00. During that year I made more repayment; sometime around election day, he told me that he could use a few hundred dollars, and again informed that he would prefer it in cash to prevent his wife from learning about the transaction. The following day I was working at the polls, it being election day, but the day after that, about the 5th of November, I cashed a check for $300.00 at the Big Club Bar and gave Mr. Schmidt $250.00. Yes, I recognize Defendant's Exhibit P —that is a check in my name drawn on the Plaza Bank, payable to the order of the Big Club Bar. I kept $50.00 of the proceeds of that check and gave the balance of $250.00 to Mr. Schmidt. (Defendant's Exhibit P is a check drawn on the Plaza Bank of St. Louis, signed by Louis Berra, in the amount of $300.00. The date of the check is November 5, 1952, and the payee is Big Club Bar. Imprinted on the top of the check is the name, Louis Berra.) No, at no time during 1952 did I have any conversation with Mr. Schmidt with respect to destroying any records or with respect to not keeping any records. In 1953, I believe I received one check from him in the amount of three or four hundred dollars. I never received a check from Mr. Schmidt made out to cash, nor did I ever demand of him that he make checks to me payable to cash. Yes, I did make repayments in 1953. About June or July of that year, Mr. Schmidt told me he was again in need of some cash, but I told him I didn't have much available. I did have approximately $100.00 on my person, which I

gave to him. In August of 1953, I had accrued slightly over $300.00 in the Local 688 Credit Union, from which I drew $300.00 by check and gave Schmidt $250.00. Defendant's Exhibit Q is a check of the Mercantile Trust Company issued by the St. Louis Joint Council Credit Union, made payable to me in the amount of $300.00 on August 18, 1953. The number of the check is 4750, and it is signed by the president and treasurer. (Defendant's Exhibit Q is a check dated August 18, 1953, No. 4750 drawn on the Mercantile Trust Company, payable to the order of Lou Berra. The amount of the check is $300.00. Stamped above the signature are the words "St. Louis Joint Council Credit Union." At the bottom of the check are two signatures: Hermi M. Muenks, Pres., and Estelle Lechner, Treas.). During the year 1954, I had several conversations with Mr. Schmidt, the first of which was in January. The subject matter of that conversation concerned a small alteration at the hiring office of the Teamsters at 11th and Pine, that he was to paint. Mr. Gibbons made the decision that Mr. Schmidt should do this job. No, during the month of January I had no conversations whatsoever with Mr. Schmidt with respect to destroying any records. I first learned that the L. H. I. was under investigation by the Internal Revenue Department in December of 1953. The next time I saw Mr. Schmidt was in February. Prior to that time, I called his home to get him to meet me to discuss some plans for the fourth floor of the L. H. I. building; his wife answered and told me he was busy doing artificial insemination and that she would have him call me. The next day Mr. Schmidt called me and told me he was busy during the day but could meet with me some evening or weekend. The following day by telephone we made an agreement to meet at my house at 1:00 o'clock the following Sunday. That was sometime during February. Mr. Schmidt did come to my house on that Sunday, at which time I had with me a copy of the plans of the architect for the fourth floor. At that time we had a discussion with respect to that blueprint during which I told Schmidt that Mr. Gibbons had requested me to get three or four bids. At no time was there any discussion of any kind about destroying any records. I absolutely did not call Mr. Schmidt at any time during February on the telephone and tell him to destroy his records. No, I

did not call Mr. Schmidt on February 22nd and tell him to tell representatives of the Government that the money I had borrowed was a loan. There was no discussion that I recall of any kind with respect to that loan in February. I had no conversation with him whatsoever on either February 22nd, 23rd or 24th in which I told him to destroy any of his records. Sometime during March I did talk to Mr. Schmidt with respect to the fourth floor job at the L. H. I. I was in the room on the first floor answering some questions for Internal Revenue Agents, Scherer and Brown, when Mr. Schmidt came in with the blueprint. After I introduced him to the two agents he went into my office and we discussed when he would submit his bid in writing to Mr. Gibbons. At that time he suggested that I recommend that he be permitted to paint at night, so that he could continue in the day. There was no conversation on that date whatsoever with respect to destruction of any records, or with respect to whether or not the money was money for a loan or anything else. Sometime later in March I received a call from Mr. Schmidt, during which he informed me that some Internal Revenue men had been checking on him as one of the contractors working for L. H. I. He stated that he was quite concerned because they were checking his income tax, and he told me that his returns showed that the loans given to me, he had deducted as commission. Prior to that conversation, I had no idea at all that he would ever report this money as being commissions instead of loans; I had never had any discussion with Mr. Schmidt previously with respect to how those matters should be entered on his income tax return. During this conversation, he stated he was considering destroying some records. I told him that it wouldn't do any good to destroy records involving checks, since the banks usually microfilmed them. I further told him that I had no reason to hide anything and that he should not worry about my checks. In response to my question as to whether they had been destroyed, his exact reply was, "Well, I have salted them away." The next time I heard from him was the second Wednesday in April. I can fix the date exactly because the Teamsters' Council meets the second Wednesday of every month, and as I was leaving the office for a meeting the operator handed me a message to call Mr. Schmidt.

I called his home at about 5:30, and his wife said that some Internal Revenue men had been there with subpoenaes and had taken all his records and equipment and trucked it down to the Federal Building. She appeared worried and asked me if I could find out anything about what was going on. I told her I would call her back, that I was going to the meeting, but that I would call her prior to the meeting at about 7:30. I called at that time, when she again answered the phone and told me that Mr. Schmidt was not home yet. I then told her I would call her again after the meeting, which I did. Again she answered and said that Mr. Schmidt had not been home yet. I then told her that I was going to George Pirone across the street from the house after the meeting, and if he got home before 12:00 or 12:30 to have him call me. I received a call at Pirone's from Mr. Schmidt. No sir, I did not make nine telephone calls that night, and I did not tell Mrs. Schmidt over the phone "To hell with the truth, let them go along and tell them a loan"; I don't talk like that. When Mr. Schmidt called me at Pirone's, it was 11:30 or 12:30. He told me that he had been questioned for four or five hours and stated that "They got me on my income tax." When I asked him what he meant, he stated that he had to tell the agents that the loans I received were gifts or kickbacks. When I objected, Schmidt told me not to worry about it, that I could get by merely by paying a few hundred dollars fine, but that he, Schmidt, had been in jail before and did not want to go back there again, and that no matter what happened he was going to tell them that it was kick-backs. And I said, "Who told you that," and he said to me, "Well, I don't recall who it was," but he said he was testifying that they were not kick-backs, they were gifts and then one of the people said to him, "Well, they were kick-backs, weren't they," and he answered, "Yes, they were kick-backs." I asked him at that time, I said, "I know I owe you about $3,000.00," he said, "Yes," I said, "Well, what if I can borrow the money and can give you the money." He said, "Well, maybe I can come down to your office or something," and then I told him that if he said what he was saying to me to the Grand Jury or the Federal Jury he would be committing perjury and he answered, "Well, I have been in the can before and I don't want to go back." Yes, I had some

work done at my house by Mr. Shulman. Before Mr. Shulman did any work I had some work done out there by Mr. Schmidt. Mr. Schmidt painted the inside and the outside of my house, either in 1951 or 1952 or 1953 and he helped me if the weather was bad or he wasn't working weekends to put down tile floor and he did a few odds and ends around there with me. I don't think that he was out there a week all together in all those years. I paid Mr. Schmidt only for the material that we used. I didn't pay him for any of the work that he did there. If he used any additional men other than himself, I paid him for that. I paid him for the entire job about $400.00. I got two receipts from him, one was for $100 and some odd dollars and the other was $200 and some odd dollars. I only retained one of the receipts. I paid it to Mr. Schmidt in cash. Yes, I had some work done on my sidewalk by the Shulman Brothers in 1951. Jack Shulman of the Shulman Company was the representative for the company and I had told him that my sidewalk was pretty bad because prior to that some woman had almost broken her leg. He said, "Well, I'll send Harry out." So Harry came out. We look around. He said, "Well, I will be out here tomorrow with a contract." So the next morning I met Mr. Herchert and he told me what he thought would be needed and I said, "All right, you go ahead and do it," and I told Harry to send me the bill. Mr. Herchert was the sub-contractor for Shulman. Herchert Contracting Company actually did two jobs a couple of months apart. After that work was done, I talked to the Shulman boys with respect to paying them for the job. They told me, "Don't worry about it, we'll get around to it." Later on I had some additional work done. I had the basement knotty pined by the Shulmans. I had some discussion with respect to the knotty pine work with Al Shulman. I told Al to go ahead and put it in and then send me the bill later. He never sent me the bill until sometime this year in 1954. Yes, I recognize Government's Exhibits 5-A, 5-B, 5-C, and 5-D. I have the authority to okay the bills over at the Labor Health Institute, at least up until the past month or two. I have probably seen Government's Exhibit 2-C before. It looks like my O. K. on it. During the time that I was business manager of the L. H. I. in 1951 and 1952, I guess about five hundred of these statements came across my

desk each month for an O. K. The usual thing that was done when an invoice or statement comes in to the L. H. I. is that we have a bookkeeper, Mrs. White, who ties in the statement with the invoices and my job was to O. K. the statement if the invoices were okay. I have never seen Government's Exhibits 5-A, 5-B, 5-C, 5-D and 5-E before, except some photostats. I did O. K. Government's Exhibit 2-A. At no time did I have any conversation with any of the Shulmans with respect to billing the work done at my house against the L. H. I. Several times I asked Al Shulman for a bill with respect to the knotty pine work that was done. It was several times between the time it was done and this year. The last couple of months we haven't had too much work around there. I only saw him about six times in the last year, but every time I saw him I would ask him when he was going to give me a bill. Never during 1949 and 1950 did I have a conversation with Mr. Schmidt in which I said to him, "What does the sheeney want?" Anybody that knows me knows that I have never said that word. With respect to the final payment on this work which was done out at my house by the Shulmans, I paid for it this year. The circumstances under which I paid for it were as follows: I received a call from one of my attorneys, Mr. Rosenblum, saying that the previous day he had taken a deposition from Mr. Shulman and I had done something that was very unethical and as rapidly as possible I should see if I could raise the money and pay Mr. Shulman. He told me that the Shulmans had billed that work to the L. H. I. Up until that time I had not known it had been billed to the L. H. I. Well, I went out and borrowed the money and I called Al Shulman and I made a personal check for the amount that my attorney had told me and I gave it to Mr. Shulman. He in turn gave me a bill that was marked paid.

Cross-Examination, by Mr. Stanard.

Yes, I do keep some personal records. I sometimes keep my bills for a year or so and sometimes my cancelled checks for a couple of months or a year whatever it might be. I keep a record of any loans that I might make. When I borrow money or somebody borrows money from me I just jot it down on my calendar down at the office and as I

get it I scratch it off.—Well, I don't usually borrow too much. I am considered a pretty good risk. In the last few years it seems that I have borrowed extensively. Sometimes I keep other records. I sign notes for instance when I have an F. H. A. repair done on my home, like storm sash or when I remodel my furnace. They gave me a book that I keep. I guess that it is required under the F. H. A. and usually by the bank. The records that I kept in my borrowing from Mr. Schmidt were that every year I put on my calendar pad at the office what I owed him and what I paid back. I got this information from the checks as I received them. I did not pay him back in checks. He told me that he preferred the cash because he didn't want his wife to know. I determined from the end of the year how much I paid him back, even though I didn't find out from my checks and I paid him back in cash because I assumed that he kept records as well as I did. At the end of the year I would write down everything that I had borrowed and everything that I had paid back to Mr. Schmidt or to anybody except that if I only loaned a guy a few dollars or he loaned me some maybe I wouldn't put that down. The records that I kept in regard to loans, both lending and borrowing, from everybody was two-fold. Sometimes I kept it in my mind, sometimes I would put it down. The only one that I kept and I still have is these loans from Mr. Schmidt and I jot them down on my calendar pad at the office. I didn't jot down any other loans on that calendar. There were other loans, only from the Credit Union, in this year. In 1953, I kept records only of the loans from Mr. Schmidt. It was in 1952 or 1953 that I borrowed money from someone other than Schmidt and the Credit Union. I borrowed money on a second deed on my home from Martin A. Beffa Realty Company. I borrowed money in 1951 from Charles Iovaldi. I believe that he was the only person from whom I borrowed money in 1951. I did not keep a record of that. That was $600.00. I repaid it. I repaid it within the next year or so. In 1952 the loan from Marty Beffa was made. They gave me a book on that. That was a second deed of trust. That's the record I kept on that. I may have made a loan from the Credit Union that year. I don't recall. The largest amount of money I ever borrowed was $10,000.00 from the Prudential Insurance Company for my home on a first

mortgage. Yes, I borrowed money from Dr. Richmond to buy my house. He was the medical director in 1949. He kept pointing out that it didn't look right for the business manager not to have a home, so he lent me $2,000.00 without interest. My mother-in-law took a second deed of trust on her home and loaned me the other $2,000.00 so I put the $4,000.00 on this house, and Prudential loaned me the balance, which was $10,000.00. My mother-in-law did not charge me interest. I signed some notes for Dr. Richmond without interest. In November of 1951, Mr. Schmidt approached me and said he was hard up and wanted some money if I could raise it. He said that he preferred cash because he didn't want his wife to know. I borrowed some money from one of my friends, Charles Iovaldi. He lent me $600.00 in cash. I gave him no security. I have had prior dealings with Mr. Iovaldi with regard to loans. Sometimes he borrowed from me and occasionally I borrowed from him. He is the cashier in the collection's office at the City Hall. On one other occasion Mr. Schmidt came to me and said he needed money. At that time I drew a check from my bank account for $300.00 and cashed it at the Big Club Bar. Also, in 1953, he approached me for money and at that time I withdrew some from the Credit Union. Previous to that, in June or July, he asked me for some money and I gave him a little over a $100.00 in cash that I had. The exact amount that I owe Mr. Schmidt now is $3,094.30. I got that figure from the little calendar pad over at the Union Office. That is the only record I keep of the loans from Schmidt. I don't keep any other record of loans besides in my mind. Yes, it is true that Mr. Schmidt volunteered to lend me money when I was telling him about my financial problems, all without interest or security. I suspect the reason that he would do that is that he thought he could get more work because of my position with the Teamsters. I didn't do or say anything to disillusion him; I think he knew that only Mr. Gibbons could let contracts. I never got any receipt for the payments to Mr. Schmidt, and I have no idea if he was keeping tract of the running balances. The balance was never as high as $3,000.00 because the transactions were stretched out over a couple of years. I needed this money for furniture, which was somewhere between $1500.00 and $3,000.00, to put a shower in the basement and to do some

plumbing around the house about $500.00, landscaping our yard for a few hundred dollars and I think five or six hundred dollars for tuition for my boy to St. Louis University.

Q. Most of these expenditures were in the luxury class, weren't they?

Mr. Hennelly: I object to the form of the question, if Your Honor please.

The Court: Overruled.

Q. (By Mr. Stanard) Do you consider these expenditures luxuries?

A. If you call living in that kind of a home a luxury, I guess it is.

Q. Have you been to Mr. Schmidt's home? A. No, sir.

Mr. Hennelly: I am going to object to the form of the question, it is immaterial, irrelevant, and becomes argumentative.

The Court: Overruled.

A. No, sir.

Q. (By Mr. Stanard) Never been out there? A. No, sir. Up until a few months ago, I was authorized to approve all of the expenditures of Labor Health Institute. Occasionally Mr. Gibbons would receive a bill that I wouldn't know about, and would O. K. it himself. I was not authorized to let contracts, either written or oral. Any such contract would have to be approved by the officers, by board resolution, and anything contrary to that would be a violation. On occasion, I may have called someone up to come in and do some work but that would have been at the direction of Mr. Gibbons. I never told anyone to come to work without Mr. Gibbons' specific instructions. After Schmidt had done work through the Shulmans at L. H. I. in 1950, I may have called him down after that to paint whatever was available, all at Mr. Gibbons' instructions. After he had done this work through the Shulman brothers, he was working for the Labor Health Institute on a time and material basis. The reason I know that is that he and Mr. Gibbons and Dr. Richmond and myself discussed it and agreed that Mr. Schmidt would

do the painting on a time and material basis, and the plumber the same way. Mr. Schmidt did come down there and work directly for L. H. I. and not through the Shulman brothers. I don't know whether I called him to tell him to come down or not. Dr. Richmond may have or Miss Kato. Dr. Richmond, the medical director, called everybody and nothing could be done without his clearance. Yes, Mr. Gibbons could act without Dr. Richmond's authority, and many times there were conflicts between he and Dr. Richmond but Harold, as president, always had the final okay. It is my testimony that I never employed Schmidt to do anything. Going back to my conversation with Schmidt in July, when we were drinking coffee, at that time Mr. Schmidt never said anything to me about his financial affairs. During my conversation to him I was just griping about how bad my income was and what I wanted to do around with the house and send my boy to college and how much it was going to cost me. At that time Schmidt offered to lend me three or four thousand dollars over a period of one or two years. I told him then that I would let him know when I needed some money. I didn't accept his offer right at that time, because it was an unethical thing to do and it was the first time in my life that I ever did anything like that. I wanted to look around a few more days. I realize now that it is certainly not ethical to have any work done at my house or borrow any money from any contractors that we do business with. In my seventeen years in the labor movement I have never taken a dime from an employer. In November of 1951, when Schmidt came to me for money, he had lent me over a thousand dollars by then. At that time he said he needed it but didn't want his wife to know and would appreciate it if I gave him cash. There was never any discussion as to why he needed the money and I never asked him. I never asked him for money; he would just give it to me in various amounts and I would tell him what the balance was. There were times maybe that he gave me money and I didn't need it, which I would then put in my bank account. At that time I knew that I owed money to the Shulmans and wanted to accrue enough money to pay it off within six months or a year. I never did pay it off until this year, but I kept a reserve

in my bank account for it. I have never gotten a bill but I kept asking for it. The amount of reserve I kept in my bank account was about $1,500.00 to $2,000.00. The source of that bank account was my pay check and Schmidt. In regard to plans for paying Mr. Schmidt off, we had discussed the idea of paying him in full the early part of next year when the second mortgage on my house runs out. Sometimes Mr. Schmidt would tell me a day or two before when I would get an installment on the loan; he would just say I am going to give you a check for so much and it makes it this much. I would then jot this down on my calendar pad. Sometimes he would just walk up and give it to me without any advance notice. Government's Exhibit 2-A looks like a bill from John Schmidt to the Labor Health Institute. My initials are on that bill and some are stamped from a rubber stamp. Some of them have pencil notations with my approval. On this one up in the heading just before John Schmidt it looks like a little "1" typed in with the typewriter. I don't know anything about that figure or what it stands for; the only thing I know is as a result of the Government's presentation in this court room. The next invoice has a little "2" in the same place and the next one has a "3", and the one of September 6, 1951 has a "4". I have presumably seen these statements when I okayed them but I never noticed any typewritten figures like that. I usually get a big batch of bills on my desk and very seldom do I ever look at the top of them. I only look mostly at the bottom part containing the figures. Up until the proceedings in this court room I never even knew those figures were on those invoices. These invoices are part of the permanent record of the Labor Health Institute which are in the custody of Mr. Weber since February of this year. I have no idea of what these numbers are; the first I heard about it was in here. (Whereupon, the court recessed until the following day.)

(Proceedings of Thursday, September 30, 1954.)

Cross-Examination, by Mr. Stanard.

Q. Mr. Berra, have you ever destroyed any records of the Labor Health Institute?

A. To the best of my knowledge——

Mr. Hennelly: I am going to object, Your Honor, for the reason it is totally irrelevant and immaterial, doesn't tend to prove or disprove any issue in the case.

The Court: Overruled.

Q. What is your answer, Mr. Berra?

A. To the best of my knowledge, no.

Q. What do you mean by the answer, to the best of your knowledge, to the question: Have you ever destroyed any such records?

A. Well, if you will define the records, maybe I could answer.

Q. By records, I mean, among other things, any paper in the official files kept in the normal course of business of the Labor Health Institute.

A. To the best of my knowledge, I have not.

Q. Will you explain your answer, Mr. Berra—to the best of your knowledge? I don't mean, did you ever do this without knowing it? Let me change my question. Have you ever knowingly destroyed any record of the Labor Health Institute?

Mr. Hennelly: I am going to object again, if Your Honor please, as being——

The Court: I think you should limit your question to the period covered by the indictment.

Mr. Stanard: Your Honor, I will confine it even more.

Q. In 1954, did you ever knowingly destroy any records or paper coming from the official files of the Labor Health Institute?

Mr. Hennelly: I am going to object, if Your Honor please, for the reasons I named, in addition it is speculative, it would be irrelevant and immaterial, would not tend to prove or disprove any issue in this case.

The Court: I cannot tell at this time. Overruled.

A. As I say, if you would define the records, what you mean by records, maybe I could answer, but to the best of my knowledge, I have never knowingly destroyed any records.

Q. In 1954, have you ever knowingly destroyed any invoices, statements or supporting vouchers contained in the files of the Labor Health Institute? A. No.

Mr. Hennelly: I am going to object, unless it is tied down to this particular case.

The Court: He has answered he did not.

Mr. Berra, were you asked that question under oath before the Grand Jury here on April 5, 1954?

Mr. Hennelly: Object again, if Your Honor please, for the reason it is irrelevant, immaterial, it is an attempt to attack the defendant on a collateral issue, and consequently the Government is bound by his answer.

The Court: In relation to the transactions involved in this case?

Mr. Stanard: Your Honor, the Government wishes to——

(Discussion off the record and out of the hearing of the jury.)

The Court: Overruled.

Q. I will ask you, Mr. Berra, were you asked that question, under oath, before the Grand Jury, on April 5, 1954?

A. I believe I was.

Q. Do you remember what your answer was?

A. Well, if you let me see that, maybe it would refresh my memory.

Q. Well, do you remember what it was, without having your memory refreshed?

Mr. Hennelly: Your Honor, may I object to that. I think, if the witness is going to be cross-examined with respect to some written instrument, that he should be permitted to examine it.

The Court: First, if he remembers what his answer was.

The Witness: Do you want me to answer that?

The Court: Yes, do you remember what your answer was?

A. I think it was the same as I made here. To the best of my knowledge, I don't recall.

Q. Do you remember, in answer to that question, you refused to answer on the ground your answer might tend to incriminate you?

Mr. Hennelly: I am going to object to that and ask that it be stricken, and then ask the jury be discharged and that a mistrial be declared, Your Honor.

The Court: Overruled.

A. I believe prior to that, that same question was asked of me, and I believe that was my answer the fourth time I was before the Grand Jury.

Q. I am speaking of April 5, 1954, do you remember claiming your privilege to that question before the Grand Jury?

A. If that was the last time I was before the Grand Jury, that was my answer.

Q. Your statement then is that, before a Grand Jury, when asked that question, you refused to answer on the ground that your answer might tend to incriminate you, is that correct, Mr. Berra?

Mr. Hennelly: One minute. I am again going to object; and I renew my previous request that the jury be discharged and a mistrial be declared.

The Court: Objection will be sustained to the question. Overrule request for mistrial. He has answered that question.

When I was having my conversation with Mr. Schmidt, as we were having coffee, I believe we were discussing a second deed of trust on my home. Interest on that loan would run between 6 and 10 per cent. I believe that we discussed some interest figures at that time, and he offered to make this arrangement to me without interest. Since I had made this arrangement with Schmidt I have gotten a second deed of trust on my home. I did that to pay off my mother-in-law's first deed on her home, which she had taken to give me a down payment on my home and I was paying the interest to her when I had a discussion with Mr. Schmidt. Then later I paid off her note and took a second on my home. At that time I could do it because the principal on my home had gone down enough that I could refinance my home and pay her off. My arrangement with

Mr. Schmidt was that he would lend me money without security or interest over a period of a year or so. About two or three weeks after the arrangement I first asked him for money. That would have been sometime in August, when he gave me a check for $650.00. That check came back from the bank because of insufficient funds. Mr. Schmidt apologized for that, and then continued to lend me money even though I didn't ask for it. I made four repayments to Mr. Schmidt. The first was made as a result of my borrowing from Charles Jovaldi when he gave me 6 one hundred dollar bills. The next one was in November, 1952, I believe, when I got the cash by cashing a check at the Big Club Bar for $300.00. I gave Schmidt $250.00. The next repayment was June in 1953, when I had just received my expense money from 688. I gave Mr. Schmidt $100.00 cash after I cashed a check. In August of 1953, I cashed a $300.00 check from the Credit Union and gave the proceeds to Mr. Schmidt. No receipt was given. There's nothing else to substantiate this statement of mine except those two checks. There's nothing on those checks to indicate what I did with the money I got from them. Yes, Mr. Schmidt called me on March 25th. In that conversation he told me that Internal Revenue Agents Brown and Scherer were out at his home and were inquiring about money he had received from the I. H. I. I don't recall if it was then or during the conversation on April 14th that he told me he had deducted these loans as commissions. He did tell me at that time that he was worried about it and that he had either destroyed or was going to destroy his records. I told him that the banks had microfilmed all cancelled checks and there would be no point in destroying them and I asked him if he had destroyed those he had given me. He told me he had salted them away. The reason I asked him if he had destroyed these checks was because I had nothing to hide and if he had destroyed them it would look like I was a party to it and approving it. This was a clean deal as far as I was concerned. No, it was not a clean deal ethically. It was very unethical as I pointed out yesterday to borrow money from one of our contractors. That is the first one I have ever made. My only involvement with Mr. Schmidt was that he came to me and offered to loan me money and I accepted these loans. The Internal Revenue Bureau's in-

vestigation of the Labor Health Institute would ordinarily have nothing to do with my arrangement with Schmidt, except that the Internal Revenue checks everybody in the business, from the smallest to the largest, and certainly if they went to interview Mr. Schmidt he would have to tell them about my loan. I was not actually concerned if Schmidt would tell anybody about these loans, but I was ashamed. Sometime in the second week of April I called Schmidt's home and Mrs. Schmidt answered. She said that sometime that evening the F. B. I. or Internal Revenue men had been there and took Mr. Schmidt and all of his books and records down to the Federal Building and that she was worried. She asked me if I could find out anything about it. I telephoned her again later immediately prior to the counsel meeting. I wasn't concerned about the fact that they took him down to the Federal Building but I certainly wanted to know what he had told them. I have never told him what to tell them. I called his home twice more after the first time, and then on the third time I said that I could be reached at George Pirone's. Mr. Schmidt called me there and told me they had all the records of the contractors and that they had grilled him for hours.

Q. And what did he say, Mr. Berra?

A. Well, I don't recall the exact words.

Q. Well, in substance?

A. That they had all of the records of all these contractors, that they grilled him for hours.

Q. Did he use the expression "grilled" to you?

A. Well, I don't—I think he says that, "They give me the works" or "The grills"—I don't remember.

Q. Wouldn't you remember if he said that he had been taken down here and given the works?

A. Well, he was all excited. I can't remember exactly the words. I had a record of it. Then he says that when they came out about the record——

The Court: Why do you use—I mean you forget about giving him the works—if you don't remember these words, why do you put that in your testimony?

A. Well, I am sorry. Well, he said that when they picked up his records, in his income tax papers or cancelled checks part had fallen out, that they had received them——

Q. (Interrupting) He told you—excuse me—did he tell you that they had fallen out of something when it was picked up? A. That is what he told me.

Q. I see. A. To the best of my memory.

Q. Well, do you remember that is just about the exact, near what he told you? A. Right.

Q. I realize you cannot remember the exact words of the conversation, but if you don't remember the exact words, give us the substance and don't make up.

A. All right.

Mr. Hennelly: Excuse me. Now, I am going to object to that. That is certainly improper, Your Honor. I ask it be stricken.

The Court: Well, I think he has been making up all day, but because he said he didn't remember the exact words, as I recall. Overruled.

Mr. Hennelly: I am going to ask that last statement be stricken, Your Honor, and that the jury be instructed to disregard it.

The Court: Overruled.

Mr. Hennelly: And that a mistrial be declared.

The Court: Overruled.

During this conversation with Schmidt over the telephone when I was at Pirone's, he told me that agents had been out there and had taken his records and that when they took his income tax papers a lot of cancelled checks had fallen out. He said he had been interrogated for hours and that he told them that the loan he had given me was commission to me. I told him he certainly put me in a bad spot, and then he told me that he had been informed that he was to be subpoenaed before the Grand Jury—I don't know whether he had the subpoena that night or not, but he certainly informed that he was going before the Grand Jury—expected to go. He said he was going to stick to the story and he had up until that time. I said well I was sorry he hadn't stuck to the truth and I was going to get hold of my attorney the next day and that if he insisted on maintaining that position he would be committing perjury before the Grand Jury.

In that same conversation I told Schmidt that I figured to the best of my records I owed him about $3,000.00 and would he accept a check if it was possible to raise the money. Then I suggested that he get himself an attorney and he said, "Well, I will let you know or come down to your office tomorrow." He never did and that was the last time I can ever recall talking to him. Yes, I heard Mrs. Schmidt's testimony and what she said was untrue. I have never used any kind of vile words to a woman in my life. Mr. Schmidt painted the outside and inside of my house and he billed me for that. He sent me two separate bills which I paid in cash, and received a receipt. Some of this might have been while I had the running account with Mr. Schmidt, in 1952 or 1953. My agreement for borrowing money from Mr. Schmidt over a period of time was supposed to end sometime in April, 1953. At the first meeting I had with him, we decided the loan was to go on over a period of one or two years. No longer than a couple of years. I paid the bills for painting my house in cash, when I already owed him money on the loan, because I happened to have the money and just didn't give it a thought. It never occurred to me to put that money for painting the house into the loan account instead of paying it to Schmidt. He did some other work besides that represented by the two bills. He helped me put some tile in my floor and some canvas on my walls. I would buy the material and he would help me. The receipt I got from Schmidt for the painting he just brought to me. I never asked him for it and I assumed he wanted it for his income tax return. I okayed Government's Exhibit 2-C, a bill from Melcher-Schene. At the time I okayed this bill from Melcher-Schene I didn't know that the material it covered went to my house. I just okay the statements and expect the bookkeepers to tie in the invoices by checking them. All I knew when I signed that statement is that it was a Melcher-Schene bill. I did not know that the Shulman work at my house had been charged to Labor Health Institute. I okayed the Shulman bills but I did not know it was for work done at my house. Mr. Herchert did work at my house but never billed me. I intended to pay Shulman as the contractor since he brought Herchert out there. I

assumed Herchert was the sub-contractor. I borrowed money and gave a check to J. Shulman and Sons for $1577 and some odd cents for the bills that were sent by mistake to Labor Health Institute. I did not know what the total amount was until one of my attorneys, Mr. Rosenblum, told me. I am sure of the exact amount that I owe Mr. Schmidt because I wrote it off of a pad of paper in my office. That pad doesn't show each separate loan and repayment but it showed the amount of loans I received each year and the amount I paid back. It doesn't show the date. I had them in 1952 and 1953, but I transferred from the pad at the beginning of the year. I don't know whether I have my calendar records for 1952 and 1953, they may be in the basement.

Q. On that day (April 5, 1954) before the Grand Jury, did you mention or infer that you had borrowed money from John Schmidt? A. Not on that occasion, no.

Q. Did you tell that before the Grand Jury that day?

A. No.

Q. At the time you gave the answer that you did not have any unpaid loans, you did, didn't you?

A. That is right.

Q. Then it was not true when you gave this answer: "Q. Any that you haven't paid back? A. No, sir, other than the mortgage on my home, and the real estate."

Q. The mortgage on your home and the real estate had nothing to do with Schmidt, did it?" A. No, sir.

Q. Well, then, your answer, "No, sir," was not true, was it? A. Evidently not.

Q. Why do you say evidently?

A. Well, it is in there, but——

Q. You remember, you stated, giving the answer of "No, sir"? A. Yes, sir.

Q. You heard the question? A. That is right.

Q. Now I ask you if it is not true that, under oath, before the Grand Jury, you told a lie?

Mr. Hennelly: I am going to object to the form of that question, if Your Honor please.

The Court: "That you gave a false answer" is a better form.

Q. That you gave a false answer?

A. On that testimony, yes, sir.

Q. Mr. Berra, on April 22, 1954, were you asked, under oath, before the Grand Jury, that you had hired John Schmidt while you were Business Manager, to do some painting at L. H. I.?

A. I may have. If you will let me look at it.

Q. On April 22, 1954, while you were under oath as a witness before the Federal Grand Jury for this District, were you asked this question, and did you give this response: "Q. Mr. Berra, while you were Business Manager of the Labor Health Institute of St. Louis, did you employ one John F. Schmidt of John F. Schmidt Painting Company, of 416 Alicia Avenue, to do some painting on the building occupied by Labor Health Institute at 1127 Pine Street in St. Louis, Missouri?" A. I believe"——

Mr. Hennelly (Interrupting): I am going to object now, for the reason that this answer will be a violation of the constitutional rights of the defendant, will be irrelevant and immaterial, it won't tend to prove any issue in the case.

Mr. Stanard: The answer is—well, excuse me—it is the last one there.

(The Court examines the transcript.)

The Court: Have you got any authority for it?

Mr. Stanard: Yes, Your Honor.

The Court: Let's see it.

Mr. Stanard: I think the O'Rashel (phonetic) case (handing up a book). There is another case, George Sylvester Vierech (phonetic).

The Court: Well, I am acquainted with this case, but you are asking the witness a question now that was put to him by the Grand Jury, and the only answer he gave was that he was standing on his constitutional rights.

(Here followed further discussion, out of the hearing of the jury, and off the record.)

The Court: Members of the Jury, I will give you the morning recess of ten minutes.

(10:55 a. m., the Jury passes out of the court room.)

The Court: Let the record show objection overruled.

Mr. Hennelly: If your Honor is going to make a ruling with respect to that point, I want to make a statement into the record, because I think that this situation is a little different, in view of what later happened when the man was taken down before Judge Moore and the question was raised, whether or not he had to answer, because at the time the United States District—(lowers voice). May I make that statement?

The Court: You may.

Mr. Hennelly: Your Honor has overruled the objection, I take it.

The Court: Yes.

Mr. Hennelly: May the record show that the defendant takes the position that at the time the witness was before the Grand Jury, that the United States District Attorney, who was in charge of the Grand Jury at that time and who was asking the questions which are presently before the Court, subsequently, in the room of Judge Moore, quite frankly told the Court that Mr. Berra was under investigation and that he was possibly a defendant and that in his opinion he was going to be indicted, and it is the position of the defendant that, under those circumstances, the Government was not acting in good faith when they placed him before the Grand Jury, and that to permit the Government now to use the fact that he refused to testify before the Grand Jury under those circumstances, that is a violation of the constitutional rights of the defendant.

Mr. Stanard: Is it necessary for me to make a statement on perjury law?

The Court: No other.

(Cross-examination was then resumed by Mr. Stanard, before the Jury, as follows:)

Q. Mr. Berra, let me ask you this, sir: On the 22nd of April, 1954, when you appeared before the Grand Jury for this District, were you represented by counsel?

A. Yes, sir.

Q. Had you appeared before that same Grand Jury previously? A. I believe I had, sir.

Q. Were you represented by counsel every time you appeared before this Grand Jury? A. Yes, sir.

Q. And was counsel present in the witness room?

A. No, sir.

Q. The witness room for the witnesses, as distinguished from the Grand Jury room?

A. Oh, I understand. Yes, sir.

Q. They were present there? A. Yes, sir.

Q. And did you from time to time request that you be allowed to consult with counsel during that——

Mr. Hennelly: I am going to ask that the question be stricken, the witness instructed not to answer, and that a mistrial be declared—it is irrelevant and immaterial—because it is only asked to prejudice the minds of the jury.

The Court: Overruled.

Q. Did you consult with counsel during these?

A. Yes, sir.

Q. Now I will ask you, Mr. Berra, whether on that date and before that Grand Jury, under oath, you were asked this question: "Mr. Berra, while you were business manager of the Labor Health Institute of St. Louis, did you employ one John F. Schmidt of John F. Schmidt Company, of 416 Alicia Avenue, to do some painting on the building occupied by Labor Health Institute at 1127 Pine Street in St. Louis, Missouri? And did you give this answer:——

Mr. Hennelly: Excuse me. May the record show the previous objection renewed?

The Court: Overruled.

Q. Answer: "I believe, Mr. Goldschein, I am here as a prospective defendant and not necessarily as a witness and any answer I might give may tend to incriminate me." Did you remember that question and that answer, Mr. Berra?

A. Yes, sir.

Q. Did you give that answer? A. Yes, sir.

(Counsel for both parties confer with the Court out of hearing of the jury.)

The Court: I will tell you, Gentlemen, you have been doing something in this case • • • I believe the Govern-

ment has no right to ask a defendant to stipulate. If a defendant wants to come forward, stipulate, but a defendant should never be asked to stipulate.

(Further discussion out of the hearing of the jury.)

The Court: Certainly I am not suggesting you stipulate.

Mr. Hennelly: I know you are not, your Honor.

Q. Mr. Berra, on the same day that you have referred to, the 22nd day of April, 1954, under oath, before the Grand Jury for this District, were you asked this question and did you give this answer: "Will you look at this check for four hundred dollars, dated February 1, 1952, payable to the order of Lou Berra and signed by John F. Schmidt and endorsed by Lou Berra and marked as Grand Jury Exhibit No. 60, Schmidt, and tell us whether or not this is your endorsement on the back of the check? A. I refuse on the same basis."

Mr. Hennelly: Now I will object and ask that the question and answer be stricken, for the reason that it is a violation of the constitutional rights of the defendant, and I now incorporate by reference the objections I have heretofore made into the record, with reference to what happened in the court room of Judge Moore subsequent to —sometime later, after he had been before the Grand Jury.

The Court: Overruled: I might say, Mr. Counselor, that my ruling is prompted partly by this defendant's statement more than once while he has been on the stand that he has nothing to hide in this matter; the records were there, and I think this is a contradiction of that attitude, and that statement he has made to the jury. I think for that reason alone. There may be other reasons. He has made broad statements about his attitude in this matter. Objection overruled. I think now, if you want to—see what took place—ask him in reference to each of those other checks, if he didn't take the same position. What his answer will be, I don't know. As to each one of them. Proceed.

Q. Do you remember being asked that question and making that answer, Mr. Berra? A. Yes.

Q. Do you remember whether that question was asked in regard to this check which is now Government's Exhibit 6-B?

Mr. Hennelly: Same objection, Your Honor.

The Court: Same ruling.

A. Yes, sir.

Mr. Hennelly: Your Honor, so that I don't encumber the record, may the record show that counsel wants to object to questions of the defendant with respect to a series of checks, and may the original objections which I have made with respect to these checks go to each one, each check about which the defendant may be questioned?

The Court: They may.

Q. Do you remember the following question and answer at that time: "Mr. Berra, will you look at this Grand Jury Exhibit, Schmidt, No. 59, which is a check signed by John F. Schmidt, of the John F. Schmidt Painting Company, dated February 18, 1952, payable to the order of Lou Berra, in the sum of three hundred fifty dollars, and I will ask you whether or not that endorsement on the back of the check is your endorsement? A. I refuse to answer on the same basis." Do you remember that, sir, and did you so refuse to answer on the same basis? A. Yes, sir.

Q. And that do you recognize as being the check referred to in the question, Mr. Berra? A. Yes, sir.

Q. That is Government's Exhibit 6-C. Were you then asked: "Will you tell the Grand Jury whether or not you got the money on either one of those checks?" And did you answer? "I refuse to answer on the same basis"?

A. Yes.

Q. Were you then asked: "Will you tell the Grand Jury whether or not you got the money on either one of those checks?" And did you answer "I refuse to answer on the same basis"? A. Yes.

Q. Were you then asked: "Mr. Berra, will you look at Grand Jury Exhibit, Schmidt, 58, dated February 29, 1952, payable to the order of Lou Berra, in the sum of two hundred dollars, and signed by John F. Schmidt, of the John F. Schmidt Painting Company, and look at the endorsement on the back of that check and tell us whether or not

you signed your name and whether or not you got the money?" And did you answer: "I refuse to answer on the same basis"? A. Yes, sir.

Q. And is Government's Exhibit No. 6-D the check referred to in that question, Mr. Berra? A. Yes, sir.

Q. And were you asked: "Will you look at Grand Jury Exhibit, Schmidt, No. 61, a check dated March 25, 1952, payable to the order of Lou Berra, in the sum of two hundred dollars, signed by John F. Schmidt, of Schmidt Painting Company, all these checks are on the Mound City Trust Company, St. Louis, Missouri, and tell us whether or not you got the money on this check and whether or not your endorsement appears on the back of it?" And did you answer: "I believe I am here as a prospective defendant, and not necessarily as a witness, and I refuse to answer on the grounds it might incriminate me"?

A. Yes, sir.

Q. And is Government's Exhibit 6-E the check referred to in the question, Mr. Berra?

(The witness examines Government's Exhibit 6-E.)

A. Yes, sir.

Q. And were you asked at that time: "Will you look at Grand Jury Exhibit, Schmidt, No. 57, a check dated April 10, 1952, payable to the order of Lou Berra, in the sum of $319.00, signed by John F. Schmidt, of John F. Schmidt Painting Company, and tell us whether or not you got the money on this check." A. "I refuse to answer on the same basis." Did you make that answer?

A. Yes, sir.

Q. And is this the check referred to, Mr. Berra, Government's Exhibit 6-F? A. Yes, sir.

Q. "Will you look at this check, Mr. Berra, Grand Jury Exhibit, Schmidt, dated—Schmidt, 62, dated December 12, 1952, payable to the order of Lou Berra for four hundred dollars, signed by John F. Schmidt, of John F. Schmidt Painting Company, these checks are on the Mound City Trust Company of St. Louis, Missouri, and tell us whether or not you got the money on this check?" And did you answer: "I refuse to answer on the same basis"?

A. Yes, sir.

Q. And is Government's Exhibit 6-H the check referred to in the question, sir? A. Yes, sir.

Q. And were you asked: "Will you look at this check marked Grand Jury Exhibit, Schmidt, 1-A, dated November 14, 1952, for three hundred dollars, and tell us whether or not you got the money on that check?" And did you answer: "I refuse to answer on the same basis"?

A. Yes, sir.

Q. And is Government's Exhibit 6-G the check referred to in the question, Mr. Berra? A. Yes, sir.

Q. Were you then asked: "Will you look at this next check marked Grand Jury Exhibit 63, dated December 24, 1952, for one hundred dollars, signed by John F. Schmidt of John F. Schmidt Painting Company and tell us whether you got the money on this check?" And did you answer: "I refuse to answer on the same basis"?

A. Yes, sir.

Q. Is Government's Exhibit 6-I the check referred to in that question? A. Yes, sir.

Q. Were you then asked: "Will you look at Grand Jury Exhibit, Schmidt, 64, dated April 7, 1953, for four hundred dollars, and tell us whether or not you got the money on this check signed by John F. Schmidt?" And did you answer: "I refuse to answer on the same basis"?

A. Yes, sir.

Q. Is Government's Exhibit 6-J, the check referred to in the question? A. Yes, sir.

Q. Were you then asked: "This check is made payable to you, isn't it?" And did you then say: "I refuse to answer"? A. Yes, sir.

Q. Were you then asked: "Will you look at this check marked Exhibit, Schmidt, 2-A, dated April 20, 1953, for one hundred dollars, signed by John F. Schmidt on the Mound City Trust Company, and tell us whether or not you got the money on this check?" And did you state: "I refuse to answer on the same grounds"? A. Yes, sir.

Q. And is Government's Exhibit 6-K the check referred to in the question? A. Yes, sir.

Q. Were you then asked: "Will you look at this check marked Grand Jury Exhibit, Schmidt, 4-A, I think it is, dated May 15, 1953—to make sure we have the right check, we will set out the number, 1390, for two hundred dollars, signed by John F. Schmidt of John F. Schmidt Painting Company, and tell us whether or not you got the money on that check?" And did you say: "I repeat

again, I believe I am here as a prospective defendant and not necessarily as a witness, and any answer I might give may tend to incriminate me." Did you say that, sir?

A. Yes.

Q. And is Government's Exhibit 6-L the check referred to in that question? A. Yes, sir.

Q. Were you then asked: "Will you look at Grand Jury Exhibit 5-A, dated June 19, 1953, in the sum of two hundred dollars, signed by John F. Schmidt, and tell us whether or not you got the money on this check?" And did you say: "I refuse to answer on the same grounds"?

A. Yes, sir.

Q. Is Government's Exhibit 6-M the check referred to in that question? A. Yes, sir.

Q. At this same time, Mr. Berra, on the 22nd of April——

Mr. Hennelly: Excuse me. May I make an objection now in respect to checks, and move the Court to strike all the testimony in respect to checks, for the reason that it is irrelevant, immaterial, that proper foundation has not been laid for it?

The Court: You referred to that in your first objection.

Mr. Hennelly: Yes. I want to make the motion to strike now.

The Court: It isn't necessary. And on any objection to the testimony, you have the record. You don't have to make a motion to strike out in this court.

Q. On the same day, Mr. Berra, the 22nd of April, 1954, while you were under oath before the Federal Grand Jury for the Eastern Judicial District of Missouri, were you asked this question and did you give this answer: "Q. Mr. Berra, in August of 1951, did you get a check for six hundred fifty dollars from Mr. Schmidt?"

Mr. Hennelly: I am going to object now, if Your Honor please, for the reason that it is irrelevant and immaterial, the proper foundation has not been laid for it, that the question as stated and the answer, if made, regarding Grand Jury testimony, would be a violation of the constitutional rights of the defendant.

The Court: Overruled.

Q. Do you remember the question, Mr. Berra?
A. Yes, sir.

The Court: Did you finish it? I didn't get it.

Q. The question is: "Mr. Berra, in August of 1951, did you get a check for six hundred fifty dollars from Mr. Schmidt?"

Mr. Hennelly: Same objection, Your Honor.

The Court: Same ruling.

Q. Did you answer this: "As I informed you, Mr. Goldschein, I have been informed that the Internal Revenue Department is checking my income taxes; on that basis I believe any answer I might give would tend to incriminate me"? A. Yes, sir.

Q. Were you then asked: "Now, in September of 1951, did you receive a check for four hundred dollars from John F. Schmidt?" and did you——

Mr. Hennelly: (Interrupting.) I object to that question for the reason I stated to the previous question, Your Honor.

The Court: Same ruling.

Q. And did you answer: "I refuse to answer on the same basis I stated previously"? A. Yes, sir.

Q. Were you then asked: "In October of 1951, did you receive a check for six hundred fifty dollars from John F. Schmidt?"

Mr. Hennelly: Same objection, Your Honor, for the same reasons.

The Court: Same ruling.

Q. Did you answer: "I refuse to answer on the same basis"? A. Yes, sir.

Q. Were you then asked: "In November of 1951, did you receive a check for two hundred twenty-five dollars from John F. Schmidt?"

Mr. Hennelly: Same objection, for the same reasons previously stated.

Q. And did you then state: "I refuse to answer on the same basis"? A. Yes, sir.

Q. Were you then asked: "Mr. Berra, within the past sixty days, did you call Mr. John F. Schmidt on the telephone?"

Mr. Hennelly: I will object for the same reasons, for the reason it is irrelevant and immaterial, won't tend to prove or disprove any issue in the case, it clearly indicates, by looking at the transcript, what the answer is to be, that it is asked in expectation of an answer which is in violation of the constitutional rights of the defendant.

The Court: Overruled.

Q. Do you remember that question, Mr. Berra? Do you remember that question, or should I read it again?

A. No. If you will read that answer, maybe I can.

Q. Well, my question is, on this occasion were you asked: "Mr. Berra, within the past sixty days, did you call Mr. John F. Schmidt on the telephone?"

Mr. Hennelly: Same objection, Your Honor.

Q. And did you answer: "I refuse to answer on the grounds it might incriminate me"? A. Yes, sir.

Q. Were you then asked: "Did you call him since the 19th day of February, 1954?"

Mr. Hennelly: Same objection, Your Honor.

The Court: Same ruling.

Q. And did you answer: "I refuse to answer on the grounds it might incriminate me"? A. Yes, sir.

Q. Were you then asked this question: "Did you call him on the telephone and ask him to destroy some cancelled checks, checks that were made payable to you, destroy those checks and to destroy the check stubs and the records of any payments of money to you?"

Mr. Hennelly: Same objection, Your Honor.

The Court: Same ruling.

Q. And did you answer: "As I recall it, Mr. Goldschein, I have been accused of destroying, practically accused of destroying records, and I believe any answer I might give to that would surely incriminate me because I am on contempt yet for not producing the records of the L. H. I., and certainly I believe if I answered that question it would

certainly tend to incriminate me in any way, whether I answered it yes or no"?

Mr. Hennelly: May I now again object to that and ask, if Your Honor please, that that question and that answer be stricken and the jury asked to disregard, and that a mistrial be declared, and the answer itself supplies a violation of the constitutional rights of the defendant?

The Court: Overruled.

Q. Then were you asked——

Mr. Hennelly: Excuse me. I don't know the answer to the last question.

Mr. Stanard: I am sorry.

Q. Did you give that answer which I read? A. Yes.

Q. Thank you. Were you then asked: "Now, did you call Mr. John F. Schmidt to your home after February 19, 1954, and ask him whether or not he had destroyed those records?"

Mr. Hennelly: I will object for the same reasons I have stated, Your Honor.

The Court: Same ruling.

Q. And did you answer: "I refuse to answer that question on the grounds it might incriminate me"? A. Yes, sir.

Q. Were you then asked: "Did you ask John F. Schmidt to testify before the Grand Jury when he was called that he had lent you money and that you had repaid this money in cash?"

Mr. Hennelly: Same objection, Your Honor.

The Court: Same ruling.

Q. And did you answer: "I refuse to answer that on the grounds it might incriminate me"? A. Yes, sir.

Q. Were you then asked: "Did you call John F. Schmidt and ask him to come down and see you within the past ten days?"

Mr. Hennelly: Same objection, Your Honor.

The Court: Same ruling.

Q. And did you answer: "I refuse to answer that on the grounds it might incriminate me"? Did you give that answer? A. Yes, sir.

Q. Now, all these answers that you have referred to, you gave under oath, on the 22nd of April, 1954, before the Grand Jury, isn't that correct?

Mr. Hennelly: Same objection, Your Honor.

The Court: Same ruling.

A. Yes, sir.

Q. And you were advised by counsel at that time, the day that you were testifying, and did you have your lawyer with you outside of the Grand Jury room?

A. He had advised me of my constitutional rights and I had answered as a result of my last discussion of Mr. Schmidt.

Q. Now, at the time you gave those answers and claimed your privilege to those questions, did you know that these payments that Schmidt had made to you were loans, as you have testified?

Mr. Hennelly: I am going to object to that, for the reason, Your Honor, that the question incorporates within it certain sections of the question which I had heretofore objected to, and I just wanted to be sure I saved the record as to that exception.

The Court: Overruled.

A. Yes, sir.

Q. Did you know they were loans? A. Yes, sir.

Q. When you gave those answers? A. Yes, sir.

Redirect Examination, by Mr. Hennelly.

I became apprehensive after the report of the conversation I had with Mr. Schmidt on April 14th, when he told me that he was going to tell the Grand Jury it was kickbacks and not a loan. I told him at that time he would be committing perjury before the Grand Jury. On April 5th, when I told the Grand Jury that the largest sum I had ever borrowed was $4,000.00, as a matter of fact the highest I had borrowed was $10,000.00, which was a loan on my home. I did not tell Mr. Goldschein about that at that time. No one had asked me to bring over any records

of that nature and he was just asking me a lot of questions, jumping on one thing and the other. I was mistaken and that is all. I was mistaken when I said $4,000.00 was the largest amount I had ever borrowed. I did not wilfully tell the Grand Jury an untruth. I testified before the Grand Jury four times and I spent three or four weeks in the witness room altogether. When I was inside of the Grand Jury room I was by myself with no one representing me. Yes, the money I received from Mr. Schmidt were loans.

ELMER W. WEBER testified as follows:

Direct Examination, by Mr. Hennelly.

I am the same Elmer Weber that has been previously sworn in this case. I am the house accountant for the Labor Health Institute and have been the court-appointed custodian of the records of the L. H. I. I have in my possession the minute book which was previously identified as Defendant's Exhibit A. These minutes are in my custody and they are kept in the normal course of business. The minutes of the Board of Trustees for the Labor Health Institute for December 28, 1950, held at the DeSoto Hotel contain the following resolution: "Whereas, it was recommended and approved at a meeting of the Board of Trustees of the Labor Health Institute, held on the 28th of December, 1950, that the Publicity Building be expanded and altered in the following respects:

"Alteration of five floors to provide more space for medical services; replacing the front of building; reconstructing lobby; closing off the elevator shaft and putting in a new elevator; and whereas a budget has been temporarily appropriated for said purposes, and whereas it is the desire of the said Board of Trustees to amend the aforesaid expansion and alteration program to include the closing of the stairway, in addition to the other items above-mentioned, and whereas it is the further desire of the said Board of Trustees to delegate the duties, power, and authority vested in them in completing arrangements of said expansion and alteration program.....

.....

so that the program may be undertaken expeditiously,

"Be it therefore resolved, that the duties, powers, and authority of the Board of Trustees on the matters and things as aforesaid be, and they are hereby delegated jointly to the officers of the Labor Health Institute, to-wit, the president, the vice-president, and the secretary-treasurer, subject only to the following provisions and limitations:"

Lou Berra was not one of the officers designated within that minute entry. I am personally acquainted with Nancy Davis, who works at the L. H. I. She is in charge of collecting the dues from members of Local 688 and she has authority to cash checks. I would say that four people have authority to cash checks, Mrs. Rower, Mrs. Davis, Miss Kay, I can't think of her last name, and Mrs. Davis. Mrs. Davis has in her custody the stamp for the purpose of endorsing those checks and she is the one that deposits them.

MAHLON RUBIN testified as follows:

Direct Examination, by Mr. Hennelly.

My name is Mahlon Rubin and I am a Certified Public Accountant. I am a graduate of Washington University, I am a member of the American Institute of Accounting, the Missouri Society of Certified Public Accountants, and licensed to practice before the Treasury Department. I am in the general practice of public accounting. Yes, I have seen Government's Exhibit 6-A before. That is a copy of a work sheet that was attached to the 1951 income tax return of John Schmidt. Defendant's Exhibit G is a copy of the 1951 income tax return of John F. and Rose Schmidt. Included in Defendant's Exhibit G is a photostatic copy of this same work sheet that has been introduced as Government's Exhibit 6-A. Government's Exhibit 2-A is copies of invoices from John F. Schmidt Painting Company to the Labor Health Institute for the year 1951. I have made a total of the invoices which have been introduced. The total for the year 1951, which were paid to Mr. Schmidt, is $11,548.24. The amount that is entered on the worksheet of Government's Exhibit 6-A is $10,387.64. Government's Exhibit 2-E, a check, is in the amount of $1,160.60. Based upon my computations,

the $1160.60 invoice was not included in the amount reported by taxpayer Schmidt.

Cross-Examination, by Mr. Rehm.

I do not know of my own knowledge whether Mr. Schmidt ever received the money represented by this check. All I have seen is the check. I was never his accountant and never handled his accounting. I never prepared Mr. Schmidt's returns.

Redirect Examination, by Mr. Hennelly.

Q. I will ask you one question. Assuming, Mr. Rubin, that Mr. Schmidt was on a cash basis and that Mr. Schmidt accounted for the money which was received on the calendar year for 1951 as he received it: Now, taking, that into consideration, sir, would you say that he included $1,160.60 in his income tax return for that year?

Mr. Rehm: Just a minute, Your Honor. I object to that question as not being material, competent, or relevant, does not tend to prove or disprove any point in issue. Mr. Schmidt's tax return is not in issue in this case.

The Court: I made some comments on that previously. We are not trying Mr. Schmidt in this case. We are trying the defendant.

Mr. Hennelly: Your Honor, might I at this time offer into evidence Defendant's Exhibit G? May I offer into evidence Defendant's G?

The Court: What is it?

Mr. Hennelly: It is 1951 income tax return for Schmidt, for John Schmidt.

Mr. Rehm: Your Honor, I will object to that, for the same reason given in the previous objections I have made.

The Court: Have you got any authority for your contention you are trying to impeach a witness on isolated collateral matter?

Mr. Hennelly: No, Your Honor. I have some authority, Your Honor.

The Court: Well, let's see it. This was not offered in the beginning.

Mr. Hennelly: To impeach an isolated matter with an act of misconduct, but it was offered at the time I was interrogating Mr. Schmidt for the purpose of showing his bias and his interest. Here, Your Honor, is a memorandum of law with respect to that matter (handing a paper to the Court).

The Court: You gave me this memorandum, didn't you?

Mr. Hennelly: I think that Your Honor has seen it. No, Your Honor, I didn't. Your Honor indicated you didn't want it. I think.

The Court: (Perusing the memorandum.) It is going to take some time to read this. What is the question?

Mr. Hennelly: The question before the Court is the introduction of Defendant's Exhibit G, which was 1951, copy of income tax return of John Schmidt, Your Honor, established.

The Court: Very well. It will be received.

Q. I am going to hand you now, Mr. Mahlon, Defendant's Exhibit B. I will ask you what that is, sir?

A. It is a check of the Labor Health Institute, dated February 9, 1951, in the amount of $1,160.60, payable to John F. Schmidt, endorsed by John F. Schmidt.

Mr. Hennelly: We will offer this in evidence, if Your Honor please.

The Court: It will be received.

Mr. Hennelly: I have no further questions.

Mr. Rehm: No questions.

The Court: You are excused.

EDWARD HOORMANN testified as follows:

Direct Examination, by Mr. Hennelly.

My name is Edward Hoormann and I have previously been sworn to testify in this case. Defendant's Exhibits C, D, E, F, and T are deposit tickets used by all customers at Mound City Trust Company to show deposits to their checking account. I brought these down to court personally subject to a subpoena duces tecum which was served upon me in this case. These are kept in the normal course of business at the bank and they are under my custody and control. These deposit slips are for the John F. Schmidt Painting Company. The dates are October 29, 1951, October 31, 1951, November 5, 1952, November 9, 1951, and this one, I can't be sure of the date; is either February or could be 12-22-51. It looks like it is February 2, 1951. (These Exhibits were then introduced and received into evidence. Defendant's Exhibit C is a deposit slip for the Mound City Trust Company. The name of the depositor is written in as John F. Schmidt Painting Company. The date is 11-5-1952. The deposits listed are, $250.00 in currency and $752.99 by check for a total of $1,002.99. The face of the slip also bears the stamp of the bank, November 5, 52. Defendant's Exhibit D is a similar deposit slip for the Mound City Trust Company. The name of the depositor is written in as John F. Schmidt Painting Company and the date is written in as 10-29-51. The deposit on this slip is $200.00 in currency. Defendant's Exhibit E is a similar deposit slip for the Mound City Trust Company. The name of the depositor written in as John F. Schmidt Painting Company. The date is written as 11-9-51. The deposit listed is $600.00 in currency. The slip bears the stamp of the bank with the date, November 9th. Defendant's Exhibit F is a similar deposit slip for the Mound City Trust Company with the name of the depositor written in as John F. Schmidt Painting Company. No date is written at the top of the deposit slip, but the bank stamp thereon indicates the date of October 31, 1951. The slip lists a deposit of $800.00 in currency. Defendant's Exhibit T is a similar deposit slip with the name John F. Schmidt Painting Company written as depositor. No date

is written at the top of this slip. The bank date stamped across the top appears to be February 2-51. The amount of the deposit is $659.60 in currency. There is further a notation in writing on the slip as follows, "Ck. $1,160.60." Then immediately beneath that, "Pd note 501." There is a line drawn beneath those two figures and apparently a subtraction to give the figure $659.60.)

(Defendant's Exhibit M offered and received into evidence, previously described as the affidavit of John Schmidt made before Agent Scherer.)

(Defendant's Exhibit N offered and received into evidence, described as follows. This is a letter on the letterhead stationery of J. Shulman and Sons, General Contractors-Engineers. The letter is addressed to Labor Health Institute, 1127 Pine Street, St. Louis, Missouri, and states as follows: "Gentlemen: We are enclosing herewith our check for $1,577.38 as a refund to you of payments made to us in connection with work that we completed on the residence of Mr. Louis Berra at 3120 Hampton Avenue, in the latter part of 1951. This work was billed to you since at that time we had a running account in connection with a large amount of work being performed by us on your building without considering whether or not it was the personal obligation of Mr. Berra. We assumed that any payment you made us would be compensated by Mr. Berra. We learned now through a Grand Jury inquiry that this was not done and Mr. Berra has now assumed this obligation and personally paid us the aforesaid sum. It is therefore proper that we refund to you full amount of payments heretofore made in the above connection. We have no explanation as to why the bill was not sent directly to Mr. Berra at the time the work was completed other than that it was done through some inadvertence and because we felt that any question as to responsibility for the debt would be or had been worked out between you and Mr. Berra. Very truly yours, J. Shulman and Sons." The signature underneath is Al Shulman. The date at the top of the letter is September 2, 1954.)

(Defendant's Exhibit O was offered and received into evidence, it being a receipt from the Cook Paint Company,

stating as follows, "7-26-54 Received from Cook Paint and Varnish Company delivery receipts 301-58163 and 301-58545 dated 3-6-52 and 3-25-52, respectively. Foregoing receipts in the amount of $82.68 and $45.45. P. N. Brown, Internal Revenue Agent.")

The defendant rests.

The Court: Are you gentlemen ready to proceed?

Mr. Rehm: Your Honor, we have no rebuttal to offer.

Mr. Hennelly: Your Honor, may we, by leave, file these two motions, which are the same as before. I will tell the Court they are really carbon copies of the others, because we don't have the original.

(The said motions are, in words and figures, as follows, to-wit:)

"United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America, Plaintiff,
vs.
Lou Berra, Defendant. } No. 27857 (2).

Motion for Judgment of Acquittal.

Comes now the defendant in the above captioned matter and moves for a judgment of acquittal at the close of the entire case on both Counts, and for good cause of said motion states:

1. The proof and evidence has failed to show that the witness Schmidt was under subpoena to testify before the federal grand jury on or at February 21, 22, or 23, 1954, or that the witness Schmidt on said dates desired to testify, intended to testify or had agreed to testify at the government's request before said grand jury.

2. The proof and evidence has failed to show that said Schmidt was a witness before said grand jury within the scope and purview of Section 1503, Title 18, U. S. C. on said dates in February of 1954.

3. The proof and evidence has failed to show that the witness Schmidt was under subpoena to testify before the federal grand jury on or at April 13 and 14, 1954, or that the witness Schmidt on said dates desired to testify, intended to testify or had agreed to testify at the government's request before said grand jury.

4. The proof and evidence has failed to show that said Schmidt was a witness before said grand jury within the scope and purview of Section 1503, Title 18, U. S. C. on said dates in April of 1954.

Respectfully submitted,

(Signed) MARK M. HENNELLY,
MARK M. HENNELLY,
(Signed) STANLEY M. ROSENBLUM,
Attorneys for Defendant."

Which said motion was by the Court marked "Refused, R. M. H."

"United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America, Plaintiff,

vs.

Louis (Lou) Berra, Defendant.

No. 27866 (2).

Motion for Judgment of Acquittal.

Comes now the defendant in the above captioned matter and moves for a judgment of acquittal at the close of the entire case on each of said Counts and for good cause of said motion states:

1. With respect to Count I

a) There is no substantial evidence that this defendant knowingly, wilfully, and intentionally filed an individual tax return for the calendar year 1951 in which he knowingly and intentionally understated his net income for the year.

b) The alleged understatements of income arising out of payments by the St. Louis Labor Health Institute to J. Shulman & Sons and Melcher-Schene Hardware Co., is based purely on circumstantial evidence not excluding every hypothesis of innocence in that in neither case is there any showing that defendant Berra knew of said payments by the L. H. I. on his behalf or account to said J. Shulman & Sons and Melcher-Schene Hardware Co., so that on the circumstantial evidence adduced the hypothesis of mistaken payment by the L. H. I. without his knowledge is as permissible as is the inference of intentional payment by the L. H. I. with defendant's knowledge or connivance.

c) The monies allegedly received from John Schmidt in said year 1951 are not taxable income to defendant and he was not required to report same; likewise, even if the evidence were to show that the payments by the L. H. I. to J. Shulman & Sons and Melcher-Schene Hardware Co. were made with defendant's knowledge and connivance, said payments were not taxable income and defendant was not required to report same on his income tax return for 1951 because

1) Said monies were embezzled by defendant from said L. H. I. in his official capacity as business manager.

2) Defendant was under an immediate and unqualified obligation to repay said misappropriated monies at the time of their felonious taking.

3) Defendant had void title to said monies and no affirmative action remained to be taken by said L. H .I. to effectuate his legal obligation to repay said embezzled funds.

d) There is not sufficient evidence to show any intent on the part of the defendant to file a false and fraudulent

tax return for the year 1951 or to evade a substantial amount of income tax due the Government.

2. With respect to Count II

a) There is no substantial evidence that this defendant knowingly, wilfully, and intentionally filed an individual tax return for the calendar year 1952 in which he knowingly and intentionally understated his net income for the year.

b) The monies received from John Schmidt in said year 1952 are not taxable to defendant and he was not required to report same because

1) Said monies were embezzled by defendant from said L. H. I. in his official capacity as business manager.

2) Defendant was under an immediate and unqualified obligation to repay said misappropriated monies at the time of their felonious taking.

3) Defendant had void title to said monies and no affirmative action remained to be taken by said L. H. I. to effectuate his legal obligation to repay said embezzled funds.

c) There is not sufficient evidence to show any intent on the part of the defendant to file a false and fraudulent tax return for the year 1952 or to evade a substantial amount of income tax due the Government.

3. With respect to Count III

a) There is no substantial evidence that this defendant knowingly, wilfully, and intentionally filed an individual tax return for the calendar year 1953 in which he knowingly and intentionally understated his net income for the year.

b) The monies received from John Schmidt in said year 1953 are not taxable to defendant and he was not required to report same because

1) Said monies were embezzled by defendant from said L. H. I. in his official capacity as business manager.

2) Defendant was under an immediate and unqualified obligation to repay said misapproprated monies at the time of their felonious taking.

3) Defendant had void title to said monies and no affirmative action remained to be taken by said L. H. I. to effectuate his legal obligation to repay said embezzled funds.

c) There is not sufficient evidence to show any intent on the part of the defendant to file a false and fraudulent tax return for the year 1953 or to evade a substantial amount of income tax due the Government.

Respectfully submitted,

(Signed) MARK M. HENNELLY,
MARK M. HENNELLY,
(Signed) STANLEY M. ROSENBLUM,
STANLEY M. ROSENBLUM,
Attorneys for Defendant."

Which said motion was by the Court marked "Refused, R. M. H."

(Whereupon, the opening argument was made by Mr. Stanard on behalf of the Government, the argument for the defendant made on behalf of the defendant made by Mr. Hennelly, and the final argument on behalf of the Government by Mr. Rehm.)

(Whereupon, court was adjourned for the day.)

(The Court reconvened on Friday, October 1, 1954, for the following proceedings were had:)

The Court's Charge to the Jury.

The Court: Members of the Jury, it now becomes my obligation to give you a charge as to the law, which you will be bound by and which you must follow in your deliberations in this case.

You are the sole triers of the factual issues. My province is solely to give you the law that you should use in passing upon the factual issues. I am bound by your

findings on the factual issues, and you are bound by my declaration of law, which you will use in passing upon these factual issues. So you see we have two separate functions to perform. Yours is that to determine the factual issues, according to the law as I give it to you, and mine is to declare the law to you that you will use in passing upon those factual issues.

In this case, as in all cases tried by a jury in a Federal Court—in any court should be—you are a part of the administration of justice. You are just as much a part of the administration of justice in this court while you are serving as jurors, as I am as the Judge of this court. Therefore, you are a very important part in the administration of justice.

It has been my observation and experience that jurors in Federal Courts have maintained a very high standard of justice, by the calm, careful, conscientious, deliberate, and impartial discharge of their duties. All jurors are officers of the Court, and it is just as important that you, as officers of the Court, discharge your duties in a proper way, as it is that I, as the Judge of this court, so conduct myself. Bear this in mind: neither you nor I represent the Government nor represent the defendant. We don't represent either side; we are not advocates for either side. Our purpose—my purpose, your purpose—is that, by the manner in which we discharge our duties, we will thereby give, without any question, assurance that the case has been tried justly, fairly, and impartially decided according to the evidence that has been introduced in the trial and according to the law as I declare it to you; and when that has been accomplished, we will then have discharged our duty.

Now, I am giving you this charge as to the law orally, because that is the manner in which the law provides that charges shall be given in Federal Court. Some of you may have served as jurors in a State Court, where instructions as to the law are given in writing, and you take them with you to your jury room. That is not the practice in the Federal Court, based on the principle, which we think is proper—there are some people who have different views—that it is better to give a jury a charge in lay language, orally, from the bench, than it is to give jurors some technical instructions which, when they go out to the jury

room, they may have difficulty in understanding, because sometimes when those instructions come before the Supreme Court—a court of judges—they don't agree on what the instructions mean. So we give you an instruction orally, and, therefore, it is highly desirable that you should keep it in mind, so that you can carry it with you to the jury room and there use it.

In giving you this charge, I give it to you as a whole. It would be highly improper—and I am sure you will not do it—to disregard part of it and not use that part, and use some other parts that did appeal to you. The instruction is designed to cover the case as a whole, and, therefore, you should use it and apply it as a whole.

In your deliberations and your decision on the factual issues, namely, the guilt or innocence of the defendant on the respective counts in these two indictments, you will, of course, exclude from your mind any feeling of sympathy or illwill, if you have any, one way or the other, against either of the parties to this case—the Government or the defendant. Neither passion, nor prejudice, nor sympathy, should influence you in any manner in deciding this case, because it is your sworn duty to try the case and decide it according to the evidence and this charge, and your verdict must be a just one and the only verdict that is called for by the evidence and the charge.

If, during the course of this charge, I comment on the evidence—and I will—and I say anything as to what the evidence is in the case which does not agree or coincide with your understanding and your belief of what the evidence is, you disregard anything I say about the evidence that is not in accordance with your understanding and belief as to what the evidence is. Now that goes back to what I said a moment ago: you are the sole judges of the credibility of the witnesses and the weight that you will give to their testimony, and yours is the sole province to determine what the evidence is. The only reason that I shall make any comment on the evidence, is to try to point out to you the application of the rules of law and to aid and assist you in reconciling this evidence according to the rules of law.

As I told you when you were impaneled, we are trying two cases, two separate indictments were returned by the Grand Jury against the defendant, and we are not going

to have two trials, one trial for each of the indictments, but both of the cases or the two cases were consolidated for the one trial before you.

Now, you will recall and understand, of course, that one of the Government's charges is filing of fraudulent tax returns for the years 1951, and 1952, and 1953, and the other case is in two counts, and charges the defendant with attempting to obstruct justice. I will comment on these two charges more in detail.

Two classifications, I might point out to you, or the evidence, rather, falls into two classifications, as the basis of the Government's claim that defendant filed false income tax returns for the years in question. For part of the period, one of the classifications is work done by the Shulmans at the defendant's home. The second classification is in respect to checks which the defendant received from the Witness Schmidt.

Now, there isn't any question in this case—defendant admitted it on the stand—but what there was work done at the home of the defendant, by the Shulmans, and that the work at the time it was performed was not paid for by the defendant, but that the bills were sent to the Labor Health Institute and paid for by them. It is these payments, or reasonable value of the work during the period in which it was performed, that is one of the elements of income which the Government claims the defendant failed to report in his tax return.

There is further no dispute but what the defendant did receive from the Witness Schmidt the money which the Witness Schmidt says he paid to him, which the Witness Schmidt said he received by tacking on fictitious or false charges on the bills he submitted to the Labor Health Institute. The defendant does not admit receiving the exact amount which the Witness Schmidt said he paid to him, but he does admit receiving substantially the sums that Witness Schmidt said he paid to the defendant.

Now, the defendant's position, broadly, on the first charge is that he expected to pay for the repairs to his home and told the contractor to send him bills, but the contractor did not send him the bills, and, secondly, it is the defendant's position that the Witness Schmidt never did give him any money as such, but that the money was turned over to him as loans.

Now, those are, broadly, the positions of the parties on the charge of income tax evasion.

The statute upon which this indictment was based provides—and I will quote the part of it that pertains to this charge:

> "And any person who wilfully attempts, in any manner, to evade or defeat any tax imposed by this chapter"——

And that refers to income taxes—

> "or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and punished as provided in the statute."

Now, let me read one of the counts of the indictment that contains the three counts charging filing of fraudulent tax returns. The first count reads:

> "That on or about the 17th day of March, 1952, in the Eastern Division of the Eastern District of Missouri, Louis (Lou) Berra, a resident of St. Louis, Missouri, who during the calendar year 1951 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1951, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Missouri, at St. Louis, Missouri, a false and fraudulent joint income tax return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of $5,177.22 and that the amount of tax due and owing thereon was the sum of $566.54, whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $8,669.83, upon which said net income there was owing to the United States of America an income tax of $1,324.42."

Or substantially twice the amount of tax that was returned.

The second count is a charge in similar language, with respect to the return for the year 1952; and the third count is a charge with respect to the return for the year 1953;

and charges a substantial understatement of income in these counts, and a substantial understatement of the amount of tax due in each of those years, and the charge as to the understatement of income in each case relates, that in 1951 to the work done by Shulman Brothers, and the checks which the defendant received from the Witness Schmidt, and in 1952 the checks received by the defendant from the Witness Schmidt, and in 1953 it relates to the undeclared income on checks and the money on the checks received from the Witness Schmidt. So we are, in this case, concerned solely with, and the case revolves around, those two characters and classifications of income.

Now, I say to you, Members of the Jury, before the defendant can be held criminally responsible for filing a false income tax return, as I have read it to you, the Government must prove, beyond a reasonable doubt, that the return is false and fraudulent, in that it failed to include all of the defendant's taxable income for the year the return was filed, and that the defendant knew the return was false and fraudulent in that respect at the time it was filed, and that such filing of such a return was made wilfully by the defendant, with such knowledge by the defendant that such return was false and fraudulent, and with the intent on the part of the defendant to evade taxes on the defendant's unreported income.

So if you find in this case, Ladies and Gentlemen, that the defendant did omit a substantial part of his income from either one or more of the tax returns in question and referred to the three counts of the indictment I have just read to you, we then become concerned here with: What were his intentions at the time these income tax returns were executed and filed by him? Not what his intentions may have been later, what his intentions may have been after this indictment was filed, but what were his intentions when he executed that tax return and caused it to be filed with the Internal Revenue Collector's office?

I want to discuss this matter of intent with you. Did the defendant execute and file these tax returns referred to in the indictment and omit a part of his income from the returns, that is, a substantial part? And if you find he did this, then did he do it with the intent to defraud the Government of income tax due the Government as charged in the indictment? The intent of a person we know is a

mental state, so when we speak of intent, we are referring to mental operation purely. Intent, therefore, is a matter that must be gathered from one's actions, that is, our belief and our finding as to intent, we must find that and determine it from one's actions and the circumstances surrounding a person's actions. Ordinarily, with knowledge of definite acts committed by a person, together with facts and circumstances accompanying the acts to show a motive or lack of motive, one is enabled to form definite conclusions therefrom as to the intent of a person in doing particular acts. We are, in our daily affairs, constantly called upon to decide from the actions of people what their intentions and purposes may be in doing those acts and, as a rule, we are able to come to a conclusive decision as to what their intentions were from their acts and the circumstances surrounding them. Experience tells us that sometimes actions speak more clearly than spoken words or printed words, of what a person's intent may be. A careful and intelligent consideration of facts and circumstances shown by the evidence in any given case may enable one to determine what may be another's intentions and what his intentions were or were not in doing certain things.

In determining what the defendant's intentions may have been, you may take into consideration all the facts and circumstances offered in evidence, if you find there was an omission from his tax return, or any one of the three, of a substantial amount of his income. You can, and I think you should, carefully consider the defendant's background, what his occupation is, and in this case we have had introduced numerous invoices, which are the basis of the Government's case; they bear the defendant's approval as to payment by the Labor Health Institute. Did the defendant know what he was doing with respect to funds and the source of the funds, and where they were going, when he approved those invoices?

You are not entirely dependent, Ladies and Gentlemen, in this case upon the testimony of either the defendant, or the defndant's witnesses, or the Government's witnesses. You have in this case a large number of physical exhibits about which there is no dispute. You have other matters that you might consider.

Take the fact of the manner in which Shulman, after

repairs were made at the defendant's house; the Witness Shulman was put on by the defendant; the defendant therefore vouched for his credibility; and Shulman testified that when he made these repairs, he sent the bills or had the bills sent to the Labor Health Institute, and in place of sending the bills for the actual work that was done, he had the bills decoded, so to speak, into hours. Why was that done? I think you might well consider that. Was it done to deceive? Was it done to make false records of what was actually being paid for?

And I think there is another matter that you might well consider, and that is that the circumstance or manner in which Shulman handled the payment of the bills for the work done on the defendant's home was substantially the same manner as the Witness Schmidt used in getting the money that he said he gave to the defendant as a kick back. Do you see any similarity in that chain of events? Whether you do is for you to determine. There are those notes and words on the bills. Did the defendant understand what they meant, as the Witness Schmidt said he put on there with the understanding that they meant certain things to the defendant, or was the defendant ignorant of those letters on those bills, until he came into this court room, as he testified?

Did the defendant keep any records? It is a singular thing to me, and I think you might well consider it—the defendant said he had a bank account, as I recall it, during the time he was getting loans, as he called them, from the Witness Schmidt—Witness Schmidt called them "kick backs", but the defendant said he had a bank account of approximately fifteen hundred dollars at that time and running though that period, as I recall the testimony. If I am in error, you will recall it. Now, one of those checks —I think it was the very first check that the Witness Schmidt gave to him—failed to clear, because the Witness Schmidt did not have enough money in his account to pay it. You saw the financial statement and the tax return of the Witness Schmidt. I think it was filed in 1951. Would a man, and consider a man in that kind of financial condition, voluntarily loan money without security, without any record as to the obligation, such as a note, without interest, and, in a sense go to the defendant and say, "Here is more money", when he was in that

shape financially? Now, whether he did or didn't, that is for you to determine, but that is an issue in the case, and I submit it to you as one of the circumstances bearing upon the factual issue.

And there are other things, and one I think I might mention to you, the defendant said he kept some character of record on a calendar; he came into the court and when he was asked how much he owed to the Witness Schmidt, he stated then, I think, some three thousand dollars down to a small item of thirty cents. A very odd sum. Yet no records of any character were produced by the defendant showing that he had kept records of those loans and, as he said, payments on the loans. He said he kept some character of note on a calendar, and he said he thought maybe the calendar may have been in the basement, and yet he produced no calendars nor accounted for his inability to produce.

Now, those are matters I think that you should consider in passing upon what the defendant's intention may have been and what the true transaction was; and in directing your attention to these matters, I don't intend thereby to rule out, or prevent you or in the least bit deter you from considering all other facts and circumstances in the case, but I want to get into your mind the fact that those are issues and those are circumstances which I think you might well consider in determining what the truth is in this case.

When intent is sought to be shown by actions, as the Government seeks to do in this case, and surrounding circumstances, that is, intent of the person in question, who is the defendant in this case, there must be proof of the facts by or from which the specific intent to defraud the Government of income tax due can be inferred and determined with certainty. Proof of such intent must establish this element of the charge beyond a reasonable doubt.

I don't know whether it is necessary to call your attention to this fact or not: This is a criminal case, and you should not in any manner be concerned with whether or not this defendant has any obligations—civil obligations—to the Federal Government for any tax liability. Just put the civil obligation, if there is or is not any, out of your mind. You are solely concerned with the criminal charge of filing those tax returns.

Now, this indictment that I have read to you charges a specific amount of tax understatement. It charges a specific amount of income tax evaded. It is not necessary that the Government prove that the defendant failed to include in his returns the exact amount of income which the indictment charges. It is sufficient on this phase of the Government's case, that the evidence and proof establish beyond a reasonable doubt that the defendant failed to include a substantial part of the sum charged in the indictment, which was income and which was omitted from the income tax return.

If you find that these tax returns are false and fraudulent and that they were filed by the defendant, and, I instruct you, with the intent by the defendant to defeat all or part of the tax due, and this was done wilfully, the crimes were complete as soon as the filing of the tax return was made in the Collector's office.

The issu between the testimony of the Government and the defendant is, I believe, separately drawn in the case in respect to the money paid the defendant by the Witness Schmidt and the value of the repairs, improvements, a d additions made to the defendant's home.

As to the money paid by the Witness Schmidt to the defendant, there is no dispute, as I said a moment ago, but what a substantial part of the amount was paid and received by the defendant. If you find in this case that the money received by the defendant from Schmidt was in part a loan, or the defendant conscientiously believed it to be a loan, then I say to you that any money received by the defendant from Schmidt under these circumstances would not become taxable income and the defendant could not be held liable criminally for failing to report it in his income tax return. Schmidt says it was a kick back obtained through padding the expense of doing repairing for the Labor Health Institute, and that you shall determine what the source of the money was at the time that it was received. If it was a kick back, then it was income which should have been included in his tax return.

As to the value of the repairs, and the improvements and additions to the defendant's home, again there is no question but what these additions, and repairs, and improvements were made by the parties identified by the

Government's testimony. No question but what they were paid for at the time by virtue of sending bills for a fictitious charge to the Labor Health Institute. The issue here is, did the defendant, at the time this work was done, intend that compensation for it should come from the Labor Health Institute and that he would pay no part of it, as charged by the Government? If the defendant did instruct and inform these people who were making the improvements, repairs, and additions to his home, to send him a bill, has the defendant at all times honestly considered himself obligated to pay for these repairs? If he has, then that was not taxable income and the defendant has committed no offense in failing to include the value of those repairs on his income tax return. Unless you should find and believe from the evidence, and beyond a reasonable doubt, that the defendant received the repairs and improvements to his home, referred to in the evidence, with the understanding and intention that he was not to at any time pay for the work done or materials furnished, but that the defendant intended that all the charges for such repairs and improvements would be paid, and that they were paid for by the Labor Health Institute, and unless you further find that the money the defendant received from the Witness Schmidt, that defendant received it and intended it would be received by him as a kick back, that is, that the Witness Schmidt would put a fictitious charge in the bills he submitted to the Labor Health Institute, and when paid the bill containing that false charge, the Witness Schmidt would in turn, at intervals, give any money thereby made and reported to the defendant, and that defendant accepted it and retained that money as his own, with knowledge, belief, and intent, unless you find in favor of the Government on these two issues, you will acquit the defendant under the charges contained in the indictment in Cause No. 27866, charging the filing of false income tax returns.

And now going to the charge set forth in Indictment No. 27857, with respect to the charge of endeavoring to influence and impede the due administration of justice; that indictment is in two counts. I want to read the first count to you:

"The Grand Jury charges:

That on or about the 28th day of July, 1953, a United States Grand Jury, duly impanelled and sworn to inquire within and for the body of the Eastern District of Missouri, then holding its sessions at St. Louis, Missouri, in said District, commenced an investigation concerning among other things, violations of the Anti-Racketeering Statute and the Federal revenue laws; that except for intermittent recesses the said Grand Jury investigation has been continuous from July 28, 1953 until the date of this indictment; that said Grand Jury has been assisted in its efforts by agents of the Bureau of Internal Revenue, who have conducted extensive investigations into possible violations of the revenue laws aforesaid."

Now I am going to read to you Paragraph 2, and I call your attention to the fact, as I read it, that the allegations in this paragraph are admitted by the defendant:

"That beginning on or about the 1st day of February, 1954, and continuing up to and including the date of this indictment, said Grand Jury and agents of the Bureau of Internal Revenue have conducted an investigation and inquiry into, among other things, the financial affairs of the St. Louis Labor Health Institute, located at 1127 Pine Street, in St. Louis, Missouri, and the financial affairs of Defendant Lou Berra; that said Grand Jury and agents of the Bureau of Internal Revenue have conducted investigations and inquiries into the repair and remodelling of the building at 1127 Pine Street, St. Louis, Missouri, owned by St. Louis Labor Health Institute and occupied by it and others, for the purpose of determining whether St. Louis Labor Health Institute had filed proper and accurate financial statements with the Bureau of Internal Revenue, whether its officials and employees had filed proper and accurate tax returns with the Bureau of Internal Revenue, and whether said organization or its officials or employees had violated the Federal revenue laws."

That is the end of Paragraph 2, and that is the end of the admission of the defendant with respect to this indictment.

"That one John C. Schmidt had personal knowledge and information of and concerning the payment of monies to him by St. Louis Labor Health Institute for the painting of its premises during the years 1951, 1952, and 1953, and the 'kick-back' of part of such payments by him to Lou Berra.

"That Lou Berra had personal knowledge that the said John C. Schmidt had in his possession certain cancelled checks and the stubs therefor, which he had drawn on the Mound City Bank and Trust Company from 1951 through 1953 in the approximate aggregate amount of $5,000.00, some of which had been made payable to cash and given to Lou Berra, and others of which had been made payable to Lou Berra and given to him in pursuance of a plan whereby John C. Schmidt billed the St. Louis Labor Health Institute for amounts greater than were properly due him, and by agreement with Lou Berra, paid over to him by check the amount of such additional sums received from St. Louis Labor Health Institute.

"That Lou Berra also had personal knowledge that the said John C. Schmidt had in his possession certain weekly job records reporting to show labor and material expended on the St. Louis Labor Health Institute Building at 1127 Pine Street, which records also indicated the additional amounts charged by him to St. Louis Labor Health Institute, equalling payments made by him to Lou Berra.

"And the Grand Jury further charges:

"That during the week beginning February 21, 1954, and continuing to the date of this indictment, at St. Louis, Missouri, in the Eastern Division of the Eastern District of Missouri, and within the jurisdiction of this Court, Lou Berra, defendant herein, well knowing all the premises aforesaid and knowing that the said John C. Schmidt would be called before said Grand Jury as a witness to testify with his records, did knowingly, unlawfully, feloniously, and corruptly

endeavor to influence the said Schmidt, a witness who was to appear before said Grand Jury, and to obstruct, influence and impede the due administration of justice in the following manner, to-wit:

"That on or about February 21, 1954, the Defendant Lou Berra by telephone called John C. Schmidt at his home in St. Louis County, Missouri, told him that St. Louis Labor Health Institute was being investigated by the Grand Jury and Revenue agents, and that he was afraid the 'kickbacks' he had received from the said John C. Schmidt, would be investigated by the Grand Jury and Revenue agents, and told the said John C. Schmidt to destroy all cancelled checks, stubs and records showing payments to him. Lou Berra, to the end that knowledge thereof would be withheld from the Grand Jury.

"That subsequently, on or about February 22, 1954, the Defendant Lou Berra by telephone called John C. Schmidt at his home in St. Louis County, Missouri, asked him whether he had destroyed all cancelled checks, stubs, and records showing payments to him, Lou Berra, and again told John C. Schmidt to destroy the same, to the end that knowledge thereof would be withheld from the Grand Jury.

"That subsequently, on or about February 23, 1954, the Defendant Lou Berra by telephone called John C. Schmidt at his home in St. Louis County, Missouri, asked him whether he had destroyed all cancelled checks, stubs and records showing payments to him, Lou Berra, and again told John C. Schmidt to destroy the same, to the end that knowledge thereof would be withheld from the Grand Jury."

And then follows the section of the Statute upon which it is based.

The second count of the indictment is based on the same statute, and in this count of the indictment the charge is with respect to the act relied upon by the Government as constituting violation of the statute:

"That on or about April 13, 1954, John C. Schmidt called Defendant Lou Berra at his home in St. Louis,

Missouri, and told him that agents of the Bureau of Internal Revenue had asked him about payments to Berra. That Defendant Lou Berra then told John C. Schmidt to tell the Grand Jury that Berra had borrowed money from Schmidt and had paid it back in cash, all of which the Defendant Lou Berra knew was untrue.

"That on or about April 14, 1954, the Defendant Lou Berra called John C. Schmidt at his home in St. Louis County, Missouri, and told him to tell the Grand Jury the same story that he, Berra, would tell them; to-wit, that Berra had borrowed three, four or five thousand dollars from Schmidt and had paid him back in cash, which story the Defendant Lou Berra knew was untrue. That in the same conversation Lou Berra stated that if John C. Schmidt told the Grand Jury the truth he, Lou Berra, would be stuck for perjury; and that if Schmidt got into any tax trouble through telling Berra's story, he, Lou Berra, would pay the taxes and penalty; all for the purpose of obstructing, influencing and impeding the due administration of justice."

Now, those two counts of that indictment are based on a Federal Statute, and that statute reads, so far as that indictment is concerned, as follows:

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States Commissioner or other committing magistrate, or any grand or petit juror,"——

And then follows this part, at a later portion of the statute:

"or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished" (as provided in the statute).

With reference to the two offenses charged in these two counts of this indictment that I have just read to you,

No. 27857, if you make the following findings from the evidence, beyond a reasonable doubt, and under this charge, namely, that the defendant had reasonable ground to believe and did believe that a Grand Jury was then in session in St. Louis, Missouri, and that this Grand Jury was inquiring into financial records and financial records of the employees of the Labor Health Institute and the defendant in this case, and that the Witness Schmidt—all of which has been referred to in the evidence during this trial, and as set forth in the indictment, and if you find the defendant had reasonable ground to believe and did believe that the Witness Schmidt was going to be called—now, when I use the term "Witness Schmidt," I mean the Witness Schmidt who testified in this case—that Schmidt was going to be called as a witness before the Grand Jury, and that the said Schmidt was a witness before the Grand Jury, and if you further believe that that said witness, the said Schmidt, would be called upon to testify in connection with this investigation of the matters I have referred to, and produced certain records before the Grand Jury, and if you find that the defendant, with such belief, knowing the Grand Jury was in session, corruptly and wilfully endeavored to influence Schmidt as to the testimony he would give before the Grand Jury, endeavored to influence Schmidt to give false testimony before the Grand Jury and to destroy records which might be called for by the Grand Jury, as charged in the indictment, then the defendant has violated the statute that I have read to you. Unless you so find, the defendant should be acquitted of the two charges in the two counts in the indictment No. 27857.

In this statute and in the indictment, the word corruptly is used. What does it mean? Any endeavor to impede and obstruct the due administration of justice in connection with the Grand Jury inquiry and investigation referred to is corrupt.

The language I have read uses the term: "Endeavor to influence a witness." The fact that the endeavor is unsuccessful and that the witness goes ahead and testifies to the truth, or fails to destroy these records, does not destroy the charge. Any corrupt endeavor to influence or corrupt any witness before a Grand Jury, whether successful or not, or partially successful or not, is prohibited by the statute that I have referred to.

As I recall the testimony of the Witness Schmidt, he said that he did destroy part of his records. And I will say at this time defendant denies that he ever at any time solicited the witness to give false testimony before the Grand Jury—the defendant denies that he ever at any time solicited the Witness Schmidt to destroy any of his records. The knowledge that the defendant must have had that Schmidt was a witness and that Schmidt would testify before the Grand Jury in the inquiry that I have referred to, does not mean absolute knowledge. It must be a reasonably founded belief on the defendant's part that is sufficient to make requisite knowledge on defendant's part. Inference of knowledge and motive may be shown by and from circumstances, if they can be logically inferred from that. Whether they ought to be inferred, and how valuable the inference is, is a question for you to determine from the evidence in this case. One may be a witness before the Grand Jury, within the protection of the statute that I have read, and as referred to in this indictment, even though he has not been subpoenaed, that is, he need not be under formal subpoena to be a witness, under this statute.

What is the purpose of this statute? The statute is designed not to impair the duty or liability of the witness, such as Schmidt, for illustration, but the duty and liability of a third party, such as the Government charges against the defendant in this case, who is charged with endeavoring by the means specified in the indictment to corrupt—corruptly influence a witness. The purpose of the Congress in enacting the statute was not to charge witnesses with duty or liability, but to protect witnesses in the administration of justice from the corrupt acts of third parties. It is intolerable, Ladies and Gentlemen, that the administration of justice and in the administration of justice, that witnesses can be influenced corruptly in their appearance as witnesses before those who are entitled to have the truth as to what has taken place, with regard to evidence on certain matters under special consideration by a Grand Jury. Our whole system of legal jurisprudence rests upon the statute that I have read to you.

A Grand Jury is a part of the Court. It is impanelled and directed by the Court, it is charged by the Court and

advised of its duties in matters coming before it, by the Court. A Grand Jury is an arm of the Court, acting under authority of the Court, and witnesses examined before the Grand Jury are liable to the Court precisely as witnesses testifying in this court are. The statute is designed to protect these witnesses in the Federal Courts and before Grand Juries and to prevent the miscarriage of justice by corrupt methods of third parties.

Now, the words "due administration of justice" are used. They import a free and fair opportunity being given to Grand Juries in Federal Courts to learn what they may, if not obstructed or impeded, concerning the matters under inquiry. The law is directed to those who seek to prevent a Grand Jury from learning the facts which it might otherwise learn and in thus being prevented from deciding for itself, that is, the Grand Jury deciding for itself whether or not action by the Grand Jury in the way of the return of an indictment is warranted. It is sufficient that the Grand Jury's work might have been prejudiced by the concealment of facts by a witness.

The testimony with respect to the two counts of this indictment I read to you comes from the Witness Schmidt and comes from the defendant. The Witness Schmidt testifies to certain conversations; the defendant says those conversations did not take place; he never saw Witness Schmidt do that, with reference to certain matters.

There are other surrounding circumstances that may or may not, as you decide, throw certain light upon whether or not those conversations took place. I will say to you, with reference to the money that the Witness Schmidt testified that he turned over to the defendant, or with reference to the money which the defendant admits he got from the Witness Schmidt, if that money was in fact loans, and not in their books, then even if the defendant did ask the Witness Schmidt to testify before the Grand Jury that they were loans, that would not constitute a violation of this statute and the defendant could not be convicted under this indictment.

Now, going to both of the indictments: the indictment charging obstruction of justice, that I have just referred to, and the indictment charging a violation of the Income Tax Statute: Certain words have been used, such as wil-

fully and feloniously. As used in the statute, wilfully means intentionally and not accidentally. It carries with it the idea of knowledge of the criminality of the act alleged to have been committed by the defendant.

The word knowingly means that state of mind wherein defendant was in possession of facts from which he knew or was aware that he could not do the act whereof he stands charged in the respective counts of these two indictments.

The word feloniously means wrongfully, wickedly, and against the admonition of the law. It also carries with it a deliberate intent to do a wrongful act. It includes unlawfully, because a thing cannot be done feloniously without being done unlawfully.

I am going to give you these two indictments, Ladies and Gentlemen, to take with you to the jury room. I give them to you solely for you to identify the specific charges under each count of the indictment. These indictments were returned by the Grand Jury. Bear this in mind: they constitute no evidence whatsoever of the guilt of the defendant of either of these charges, and they must not be considered by you as any evidence of his guilt. They are simply the means and the manner by which a defendant is brought to trial in a Federal Court on a criminal case and charge of this kind.

Now, I say to you further, with respect to the charges contained in each count in each of the indictments, the defendant is presumed to be innocent of the charges. This term is not a meaningless phrase that I use. That presumption applies to every element of the charge against the defendant and remains with the defendant until the evidence in each case, and as to each count, overthrows that presumption of innocence and convinces you of the guilt of the defendant beyond a reasonable doubt.

There is no obligation upon the defendant to prove his innocence. The burden of proving the defendant's guilt rests upon the plaintiff, the United States. That burden never shifts. That burden cannot be sustained unless and until the proof offered by the Government in the case convinces you beyond a reasonable doubt of the guilt of the defendant, and I am referring to each count of each indictment when I say that.

Now, let's talk about this term "reasonable doubt" a

ment. A reasonable doubt means a doubt arising out of the evidence or lack of evidence in the case. A reasonable doubt is such a doubt as leaves a juror's mind so undecided that he does not have an abiding conviction of the defendant's guilt after a full and fair consideration of all the evidence, that is, a settled conviction of guilt which the jurors believe will remain unshaken by future thought and speculation. A reasonable doubt is such a doubt as would cause a reasonable careful and prudent person to hesitate to act if it were a question of importance concerning his own affairs. But a reasonable doubt does not arise solely from mere conjecture, speculation, or whim, nor from reluctance to convict through feelings of sympathy or mercy. A reasonable doubt is a consicentious belief arising only after calm, dispassionate, and impartial consideration of all the evidence, that there is a reason to doubt the defendant's guilt.

Let me say to you further on this subject, it is not necessary for the Government to prove the guilt of the defendant beyond all possible doubt. If that were the rule, few men, however guilty they might be, would be convicted. In this world of ours, it is practically impossible for a person to be absolutely and completely convinced of any fact when in its nature it is not susceptible of proof with mathematical certainty. In consequence, the law is such that in a criminal case, it is enough that defendant's guilt be proved and established beyond a reasonable doubt, and not beyond all possible doubt.

Now, bearing these observations with respect to presumption of innocence and burden of proof in your mind, it becomes your duty to carefully consider the evidence before you, and if, as a result of such consideration, you can and do entertain a reasonable doubt of the guilt of the defendant as to any count or counts of the two indictments, it will be your duty to give the defendant the benefit of that doubt and acquit him as to each count or counts of the two indictments that you have such a doubt. If, on the other hand, the whole evidence, when carefully examined and considered by you, produces in your mind a settled conviction or belief of the guilt of the accused, belief beyond a reasonable doubt, you may be said to be free from a reasonable doubt and should accordingly find your verdict in this case.

You are going to have to pass on the credibility of the witnesses in this case. That is one of the provinces of a jury. In judging the credibility of the witnesses and the weight that you will give to their testimony, there are certain rules and standards that I will give to you, that will help you. In giving them to you, I do not intend to exclude from your use such other rules or tests which, through the years, you have become convinced should be applied in determining whether a person is telling the truth or not. Bear this in mind, Ladies and Gentlemen: you were selected as jurors in this court, not by whim or chance, but because you were considered to be representative citizens, you were considered and had the reputation of having good sound common sense; and you will not leave it behind you when you enter the jury box. You are to carry it with you and apply it and use it. So when we come to the question of passing upon the credibility of the witnesses, I think you should consider their manner and demeanor on the witness stand, but bearing in mind that sometimes a witness takes the witness stand for the first time, comes into a court room for the first time, and they may be timid, you may have difficulty hearing them, and their talk may be due to timidity rather than any desire to retain the truth and tell you a falsehood. Look to the witness' readiness or lack of readiness in answering questions. Consider the interest that a witness has in the outcome of this case. Has the witness any bias or feelings, or not, against either the Government or the defendant? What is the relationship of witnesses to the parties in interest? There was, for illustration, the witness from the Internal Revenue Department, who gave you opinions on hypothetical questions as to what the defendant's income tax would have been if certain income would have been included. He has a relationship to the Government. Then there was a witness by the name of Gibbons. Gibbons is, as I recall it, president of the Labor Health Institute. It appears probable he might have some interest in the defendant. That is for you to determine. But that is the illustration I desire to call to your attention with respect to relationship. It does not necessarily mean a blood relationship. Consider this, Ladies and Gentlemen: the knowledge that a witness has of the facts he testifies to, his chance or opportunity for knowing those facts. You will

recall the witness who was the bookkeeper for Labor Health Institute. She was exhibited three checks, and when she was first shown the checks, she said—or she was exhibited four checks. When she was first shown those checks, she said, "Yes, I cashed three of those checks." But later admitted that she was basing her opinion on the fact that this was in line of her duties and there were other people had access to those stamps and that she had no personal recollection of cashing those three checks. In other words, consider the reasonableness or unreasonableness of the testimony of each and every witness and the chance or opportunity that witness has for knowing the things he testifies about and professes to know and understand. What is the probability or improbability of the testimony of a witness? Is it probable or improbable? For illustration, that Schmidt charged and padded his charges to the Labor Health Institute, is it probable he did that to better his financial condition, in order that he might make loans to the defendant, or, on the other hand, is it probable or improbable that those were kickbacks and not loans? That is for you to determine. I simply call your attention to the standard in considering the testimony of a witness. Consider is that testimony probable or improbable, when tested by your own good sound common sense. Now, by these standards, and using any other standard which appears to you to be reasonable and just and proper, pass upon the testimony of each and every witness and the weight and value of the testimony as a whole. If you believe that any witness has wilfully testified falsely to any material fact in this case, you are at liberty to disregard the whole of that witness' testimony, as well as that part which you believe was given falsely.

Now, in giving you this latter observation under the law, I do not mean to say to you that any particular witness has testified falsely. Certainly some witnesses have testified falsely, because they cannot all be telling the truth, but it is for you to determine which of the witnesses have testified falsely.

There was the Witness Scherer, who testified as an expert. His opinion was based upon assumed facts. That is a state of facts which it is claimed by the Government has been shown by the evidence as true. So that it is

important for you to determine from hearing all the evidence in the case whether or not those facts assumed by the witness were established by the evidence. If you find that the facts stated and assumed as the basis for the hypothetical question asked of such expert were not established by the evidence, then the opinions given by the expert, based upon such assumed statement of facts, are entitled to no weight and you should attach no weight to such an opinion. It is for you to say whether such assumed state of facts, that is, the facts with reference to the amount of income of the defendant and the amounts deducted therefrom, assumed to be true by the expert, have been proved, and this you will do from all the evidence in the case bearing upon and tending to prove or disprove the facts so assumed. And if you find from the evidence in the case the facts assumed as the basis for such hypothetical question were established by the evidence, then you should consider such expert testimony by the use of the same standards that you apply to all other evidence in the case, and give it such weight as you may deem it fairly entitled to, weighing and considering it in the light of the rules given you elsewhere in this charge.

And if any witness for the Government in this case has shown bias or prejudice against this defendant and satisfies you that he has not testified truly in this case, you may disregard his testimony altogether, and if the guilt of this defendant depends upon such testimony, with respect to any particular count, then find the defendant not guilty of that particular count.

The defendant has been a witness in this case. Pass upon and weigh his testimony just as you would the testimony of any other witness who has testified in this case. Consider what motive, if any, the defendant would have for giving false testimony in this case; and what motive would other witnesses have for giving false testimony in this case.

You can consider the interest of the defendant in the outcome of this case. You should consider the interest of the defendant in the outcome of this case. Where a defendant has a strong personal interest in the result of the case, consider whether or not there is a strong temptation on the part of that witness to reserve or withhold facts from his testimony. Nothing I have said to you

means, or is intended to mean, that whenever a person accused of a crime takes the witness stand on his own behalf, as he has a right to do, that he will naturally commit perjury. By taking the witness stand, however, the defendant places himself in the position of a witness, like all other witnesses, and therefore the defendant's interest or prejudice, or feeling, or anything else that may affect his testimony, is a matter that you may take into consideration, the same as you would any other witness in passing upon the testimony.

There was testimony that the Witness Schmidt had been convicted of a criminal offense—I forget that year—you will recall it. That was received for such consideration as you desire to give it as affecting his credibility.

There have been arguments of counsel made in this case. I desire to make this comment: the purpose of counsel making arguments in a case is to try to assist you in your duties and your labors in reconciling the evidence. If any counsel has made any attempt to arouse your passions, or prejudice, or appeal to your bias or prejudice, you should disregard any such pleas of that character. Yours is a serious duty to be performed coolly, calmly, in an atmosphere where you can use good judgment and reason. You cannot do that in an atmosphere of bias and prejudice or aroused passions. You have heard all the evidence and arguments of the counsel, and I am about to conclude my charge concerning the law in this case.

It now becomes your solemn duty, under your oaths which you have taken, and the heavy obligation rests upon you, as honest jurors, zealous to perform your full duty in this case, to determine the question of the innocence of the accused, without any fear or favor whatsoever, and then to make good the promise you made at the outset of the trial, that you could and would try this case impartially and fairly, as good jurors, upon the evidence received in this court and the charge that I give you, and that nothing else would influence you in any way in reaching your verdict. Now I say to you, your duty in this case is to fairly and carefully—fairly and carefully to the defendant and fairly and carefully to the Government, consider all the evidence. If, as a result of your consideration, you then entertain a reasonable doubt as to the

guilt of the defendant as to any one or more of the counts of the two indictments, you will, as to those counts, return a verdict of not guilty. On the other hand, as to any one or more of the counts or charges of the two indictments, if, when you have considered all the evidence under this charge and in conformity with it, the evidence produces in your mind the settled conviction or belief of the guilt of the defendant, such a conviction or belief as you would be willing to act upon in important affairs of your life, then you are free from a reasonable doubt of guilt and then should accordingly find a verdict of guilty as to each count or counts of the two indictments as to which you hold such a conviction.

It is your duty, Ladies and Gentlemen, as jurors, to consult with one another when you retire to your jury room, and to deliberate with a view to reaching a verdict on each count of these two indictments, if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself, but you should do so only after discussing it with your fellow jurors, and should not hesitate to change your opinion when you are convinced that it is erroneous. You should not be influenced in any way on any question submitted to you by the simple, single fact that a majority of the jurors or any number of them favor a particular decision or hold an opinion at variance with yours. In other words, you should not surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict, or solely because of the opinion of other jurors, but you must listen to your fellow jurors calmly and sympathetically, and with understanding, and with a willingness to appreciate the views that your fellows express, so that you won't be just stubborn or mulish and resist reasonable persuasion and reasonable argument as to what the facts in this case are, all to the end that any verdict by you as a jury will be an independent one of each juror, but collective, and, therefore, the verdict of each of the twelve jurors—a unanimous verdict.

If the proof under this charge shows the defendant to be guilty of the thing or things he is charged with, he ought to be convicted; the law should be vindicated. If the defendant is innocent, or if the Government h failed

to prove his guilt beyond a reasonable doubt, you should acquit him. You sit there as twelve judges, just as I do; we represent neither party to this case; so that sitting here then, you and I sit as judges of the evidence and the facts respectively, there is an obligation that rests upon each of us, and that is to look at this testimony objectively, with the sole purpose and object of determining, under the rules of law, whether or not the defendant on trial, under the law, has done that which the law forbids and the indictments in these two cases charge. The defendant is not entitled to sympathy—sympathy or other like consideration at your hands. The fact that the Government is prosecuting this case is a matter that does not concern you in the least in deciding the issue. In your conscientious minds as jurors, you are to consider this evidence without being swayed by your emotions, or sympathy either way, and declare, as judges of the facts, the guilt or innocence of the defendant of the charges submitted to you.

What happens in the event of conviction of the defendant is a matter about which you need not be concerned. That is solely my concern, to decide what will be done with respect to any count or counts upon which you find the defendant guilty.

This is a case, Ladies and Gentlemen, that does not in any way involve labor unions or the relationship between labor—of the employee and the employer of it. If the defendant is guilty, I mean if his guilt has been established by this evidence, of these charges, members of labor unions should be the first to demand that he be punished. You are passing upon a case that in no way, manner, shape, or form is a labor controversy. Bear in mind that the law and the courts of the land organized to administer it are not and cannot be respecters of persons, regardless of what position they may hold. It is their law, and the weak and the powerful must alike be subject to the law. So approach your final consideration of this case, Ladies and Gentlemen, with becoming gravity, and allow but one purpose to actuate your duty and your conduct, and that is, insofar as it is humanly possible, find out and determine wherein the truth lies in this case here before you.

It is necessary, as to each count of each indictment, that all twelve of you agree, and when you have agreed,

you will find a form of verdict to use, regardless of what your finding may be.

With respect to Case No. 27866, I am putting a "T" underneath that number, and that "T" would indicate to you that is the indictment that charges the filing of the fraudulent tax returns. Here is the form of verdict you will use in that case:

"We, the jury in the above entitled cause on the trial of the indictment as to defendant, Louis (Lou) Berra, find as follows:

"We find the defendant, Louis (Lou) Berra (blank) as charged in Count One of the Indictment herein."

Into that blank you will write "Guilty" or "Not Guilty" as you find. And then you will find a like paragraph as to each of the other remaining two counts. You will return a separate verdict as to each of those paragraphs, as to each of the three counts, and then there is a space for your foreman alone to sign as such.

Now, as to the other indictment—and I am putting a "J" underneath the number, so that you may identify it that way, that is the indictment concerning the obstruction of justice. Here is the form of verdict you will use:

"We, the jury in the above entitled cause on the trial of the indictment as to defendant Lou Berra, find as follows:

"We find the defendant, Lou Berra (Blank) as charged in Count One of the indictment herein."

And into that blank you will write the word "Guilty" or "Not Guilty," as you find. Then you will find a like paragraph with respect to Count Two, and then a place for your foreman to sign alone as such.

There have been, as you know and as you have had some opportunity to examine, a large number of exhibits offered in the case. When you go to your jury room, you will find a bailiff outside of the door. If you want any one or more, or all, of those exhibits, give a note to the bailiff, and he will give it to me, and I will see that your request is complied with.

I think that is all the help I can be to you in this case at this time. We now have a legal matter to dispose of before you commence your deliberations, so I will ask you to step outside, and you may have your morning recess at this time, when you pass out.

(11:25 a. m., the jury leaves the court room.)

The Court: Does the Government have any suggestions or requests?

Mr. Stanard: No, Your Honor.

The Court: Defendant's exceptions?

Mr. Rosenblum: Defendant excepts to the Court's refusal to give defendant's requested instructions No. 3 and No. 4, on the grounds that, under the facts and the evidence, the monies allegedly received by defendant were not income and were not reportable in his income tax returns in the years 1951, 1952, and 1953, for the reason that said funds were embezzled and fraudulently misappropriated from the Labor Health Institute; that defendant had an immediate and unqualified obligation at all times to repay same, and that, as such, were not properly reportable in defendant's income tax returns for the years in question.

(Defendant's Requested Instruction No. 3 is, in words and figures, as follows, to-wit:)

"Defendant's Requested Instruction No. 3.

"Moral turpitude is not a touchstone of taxability. The question, rather is whether the defendant in fact received a gain or profit under the income tax law. That the taxpayer's motive may have been reprehensible or the mode of receipt of money illegal has no bearing upon whether the money is income under the tax law. However, this is not to say that an unlawful gain may not constitute taxable income; it can and may—when its recipient has such control over it that as a practical matter he derives readily realizable economic value from it. Now, as to the money which the defendant is shown by the government's evidence to have misappropriated from the St. Louis Labor Health

Institute, if you find such misappropriation to be a fact, then that money (whether misappropriated in connection with Schmidt, the Shulmans, or Melcher-Schene Hardware Co.) belonged to the St. Louis Labor Health Institute and it was never the defendant's for even a moment. If you find such misappropriation as shown by the government's evidence to be a fact, then the defendant Berra had an immediate and unqualified obligation to repay this money at all times and he had no claim of right to this money—not even a temporary or fleeting claim of right. Therefore, I charge you that, if you find such misappropriation to be a fact, then under the law defendant Berra realized no gain or profit from this misappropriated money; it was not taxable to him and he was not required to report it on any of his income tax returns in question, and you will find him not guilty of the charges of income tax evasion.

"Marienfeld v. U. S., ... Fed. 2d ... (C. A. 8, July 12, 1954)."

(Defendant's Requested Instruction No. 4, is in words and figures, as follows, to-wit:)

"Defendant's Requested Instruction No. 4.

"If you find that defendant embezzled funds from the St. Louis Labor Health Institute, said funds would not be taxable income to him. He would have realized no gain or profit from said embezzled funds and he would not be required to report it on any of his income tax returns in question."

Defendant excepts to the Court's refusal to give Defendant's Requested Instructions No. 11 and No. 12, on the grounds that, under the facts and the evidence, the defendant was entitled to an instruction on lesser crime, under Rule 31 of the Federal Rules of Criminal Procedure; on the grounds that there were not acts of misconduct indicating particularly at the times the returns in question were filed of the years 1951, and 1952, and 1953, as outlined by the Supreme Court in the Spoils Case, Spoils, Defendant, and under the authority of that Rule you may find, from the facts and the evidence, that defendant was

guilty of a misdemeanor, as offered in Defendant's Requested Instructions Nos. 11 and 12.

(Defendant's Requested Instruction No. 11 is, in words and figures, as follows, to-wit:)

"Defendant's Requested Instruction No. 11.

"Under the law you may find the defendant guilty of a lesser crime than the crime charged in each count of the indictment.

"The statute upon which the lesser crime is based, omitting that part of the Act which does not apply in this case, reads as follows:

"Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who wilfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall in addition to other penalties provided by law, be guilty of a misdemeanor.

"Under Count I of the income tax indictment if you find and believe from the evidence that on the 15th day of March, 1952, the defendant was a person required to pay a tax or to make a return, keep any records or supply any information for the purpose of the computation, assessment or collection of a tax, and if you find that the defendant knowingly and wilfully failed to pay a tax, make such a return, keep such records or supply such information at the time or times required by law, then you will find the defendant guilty of this lesser crime, under Count I of the indictment.

"Under Count II, if you find and believe from the evidence that on or about the 15th day of March, 1953, the defendant was a person required to pay a tax or to make a return, keep any records or supply any in-

formation for the purpose of the computation, assessment or collection of a tax, and if you find that the defendant knowingly and wilfully failed to pay a tax, make such a return, keep such records or supply such information at the time or times required by law, then you will find the defendant guilty of this lesser crime, under Count II of the indictment.

"Under Count III, if you find and believe from the evidence that on or about the 15th day of March, 1954, the defendant was a person required to pay a tax or to make a return, keep any records or supply any information for the purpose of the computation, assessment or collection of a tax, and if you find that the defendant knowingly and wilfully failed to pay a tax, make such a return, keep such records or supply such information at the time or times required by law, then you will find the defendant guilty of this lesser crime, under Count III of the indictment [Sec. 145 (a), Title 26.]"

(Defendant's Requested Instruction No. 12 is, in words and figures, as follows, to-wit:)

"Defendant's Requested Instruction No. 12.

"Under the law you may find the defendant guilty of a lesser crime than the crime charged in each count of the income tax indictment.

"The statute upon which the lesser crime is cased, omitting that part of the act which does not apply in this case, reads as follows:

"Whenever any person * * * delivers or discloses to a collector * * * any false or fraudulent * * * return * * * with intent to defeat or evade the * * * assessment intended to be made, shall be guilty of a misdemeanor.

"Under Count I if you find and believe from the evidence that the defendant delivered, caused to be delivered or disclosed to the Collector of Internal Revenue for the First Collection District of Missouri, a false income tax return with intent to defeat or

evade the assessment intended to be made, you will find him guilty of this lesser crime.

"Under Count II if you find and believe from the evidence that the defendant delivered, caused to be delivered or disclosed to the Collector of Internal Revenue for the First Collection District of Missouri, a false income tax return with intent to defeat or evade the assessment intended to be made, you will find him guilty of this lesser crime.

"Under Count III if you find and believe from the evidence that the defendant delivered, caused to be delivered or disclosed to the Collector of Internal Revenue for the First Collection District of Missouri, a false income tax return with intent to defeat or evade the assessment intended to be made, you will find him guilty of this lesser crime.

"(Sec. 3616 (a), Title 26.)"

Defendant excepts to the Court's refusal to give Defendant's Offered Instruction No. 13, which is the instruction asking the Court to instruct the jury not to regard defendant's invoking his constitutional privilege before the Grand Jury, in connection with any question of guilt, on the grounds that the refusal to offer such instruction was a violation of his Constitutional privilege against self-incrimination and thus nullified and defeated that privilege.

(Defendant's Requested Instruction No. 13 is, in words and figures, as follows, to-wit:)

"Defendant's Requested Instruction No. 13.

"I charge you that the fact that defendant invoked his constitutional privilege against self-incrimination before the Grand Jury constitutes no evidence whatsoever of defendant's guilt and is not to be considered by you in that regard."

In connection with the charge which was given by the Court, defendant excepts to the Court's giving and discussing the evidence and advising and telling the jury

that they could consider the alleged income as a result of the Shulman transactions, for the reason that there is no substantive evidence in the record of the defendant's knowledge that the work that was billed to the L. H. I. in 1951 was with his knowledge so that it could be income. The only evidence of defendant's knowledge that these bills had been sent to the Labor Health Institute was brought out as the result of the Government's cross-examination of the witness Shulman. While the defendant does not except to the right of the Government to use the Grand Jury testimony in the nature of statements to impeach the credibility of the witness Shulman, defendant excepts to the giving of this evidence on the ground that it—on the giving of this consideration on the ground that it does not constitute substantive evidence under the ruling of the Eighth Circuit in the case of Ellers versus United States.

Defendant excepts to that part of the Court's charge on the question of intent. The Court pointed out the Witness Schmidt's inability to make the loans. The Court pointed out the code numbers and the similarity between Schmidt and the Shulman circumstances. The Court pointed out the failure of the defendant to produce any records. The crux of the defendant's exception to this part of the charge goes to the onesidedness or argumentative nature of the Court's charge with respect to defendant's intent, and that the Court failed to point out certain circumstances which would negate that specific intent required to find defendant guilty of tax evasion under Counts 1, 2, and 3 of the tax evasion indictment, specifically, that the checks had been made out to the Defendant Lou Berra, all but three of these checks had been endorsed by the Defendant Lou Berra, and that these checks had been deposited in his bank account, and also that defendant testified that he had made the repayments to Schmidt of the three checks made out to Lou Berra, all but three of the checks, Your Honor, were made out to Defendant Lou Berra, were endorsed by Lou Berra, and were deposited in his bank account at the Plaza Bank. It is defendant's contention that these facts at least should be considered and should have been pointed out to the jury as mitigating the required specific intent under the tax evasion statutes.

In connection with the Court's charge on obstruction-of-justice counts, the defendant excepts to the Court's charge in outlining the legal requirements of the evidence, for the reason that the Court failed to instruct that Schmidt must have been a witness before the Grand Jury, either under subpoena or that he must have intended or expected to testify or had agreed to testify already at the Government's request. This charge goes specifically and expressly to Count 1 of the obstruction-of-justice indictment, because the testimony is clear that in February, of 1954, the Witness Schmidt was not then under subpoena before the Federal Grand Jury, and while the defendant does not except to that part of the Court's charge that told the jury that the Witness Schmidt need not have been under subpoena, defendant does not except specifically, but that part of the Court's charge did not tell the jury, it did not properly express that right that any defendant has, being on trial for evasion of tax on income, the right of the defendant under the ruling in the Walker case in the Eighth Circuit.

The defendant excepts to that part of the Court's charge which told the jury that if they thought it was the defendant's belief that Schmidt was a witness or going to be a witness before the Grand Jury and thought that defendant had reasonable grounds for believing that Schmidt was going to be a witness before the Grand Jury, that he should be found guilty, on the grounds that this is an incorrect and improper expression of the rule of law as set forth by the Eighth Circuit Court of Appeals in the Walker case, the Court having held that the true test under the statute under which defendant has been indicted is the subjective intent of the defendant, and that it is his intent and not the intent or what the witness believed that should have been instructed—that the jury should have been instructed on. That the jury should have been told that it was income of the Witness Schmidt, in the event he were not already under subpoena, he did not already know of it, and he was a witness; that the jury should not find the defendant guilty in the absence of actual subpoena, unless he had already been called to testify before by subpoena, or expected to testify, or had already agreed to testify.

Defendant also excepts to that part of the Court's charge, that which told the jury that if the defendant were guilty, members of labor unions should be the first to demand that he be punished, on the grounds that this was immaterial to any of the issues in the case, and prejudicial and argumentative, and was an unwarranted appeal to certain specific members of the jury.

That constitutes the exceptions, Your Honor.

The Court: Bring the jury in.

(11:22 a. m., the jury returns to the jury box.)

The Court: Members of the Jury, during the course of my charge, I enumerated certain suggested matters and circumstances that you might consider in determining whether or not the payments which the defendant received from the Witness Schmidt were loans or were kickbacks. In addition to those things which I asked you or suggested that you might consider, I add the three following:

The fact that all but three of the checks were made out to the defendant, in the defendant's name, they were endorsed by the defendant, and deposited by the defendant in his bank account.

You may now retire to consider your verdict. All except the alternate juror. You just keep your seat.

The Court: Now, you may give your forms of verdict to the bailiff.

(The jury foreman does so.)

The Clerk may read the verdict.

(And thereupon the Clerk read aloud the verdicts, the said verdicts being, respectively, in words and figures, as follows, to-wit:)

"In the District Court of the United States,
Eastern Division, Eastern Judicial
District of Missouri.

United States of America, Plaintiff, vs. Lou Berra, Defendant.	No. 27857 (2) J

Jury Verdict.

We, the jury in the above entitled cause on the trial of the indictment as to defendant Lou Berra, find as follows:

"We find the defendant, Lou Berra, guilty as charged in Count One of the indictment herein.

"We find the defendant, Lou Berra, guilty as charged in Count two of the indictment herein.

(Signed) EDWARD S. GARNHOLZ,
Foreman.

October 1, 1954."

"In the District Court of the United States,
Eastern Division, Eastern Judicial
District of Missouri.

United States of America, Plaintiff, vs. Louis (Lou) Berra, Defendant.	No. 27866 (2) "T"

Jury Verdict.

We, the jury in the above entitled cause on the trial of the indictment as to defendant, Louis (Lou) Berra, find as follows:

We find the defendant, Louis (Lou) Berra, guilty as charged in Count One of the Indictment herein.

We find the defendant, Louis (Lou) Berra, guilty as charged in Count Two of the Indictment herein.

We find the defendant, Louis (Lou) Berra, guilty as charged in Count Three of the Indictment herein.

(Signed) EDWARD S. GARNHOLZ,
Foreman.

October 1, 1954."

The Clerk: Ladies and Gentlemen of the Jury, are the separate verdicts I just read in each of these cases your true verdicts?

So say the jurors, Your Honor.

The Court: Let the verdicts be filed.

Now, I want to ask, Mr. Garnholz, these verdicts that you returned first, in which the word "yes" was written in the blank spaces, did you intend and was that intended to note a finding of guilty?

By Jury Foreman Edward S. Garnholz: Yes.

The Court: So say all the jurors?

(The jurors answer affirmatively.)

Motion for Judgment of Acquittal or in the Alternative for a New Trial.

(Filed October 18, 1954, in the United States District Court.)

United States District Court
Eastern District of Missouri,
Eastern Division.

United States of America, Plaintiff,		No. 27857.
vs.		No. 27866.
Louis (Lou) Berra, Defendant.		Consolidated Causes.

Comes now the defendant in the above captioned matter and moves for a judgment of acquittal or in the alternative for a new trial and for good cause for said motion states as follows:

1. There is no substantial evidence that this defendant knowingly, wilfully and intentionally filed an individual tax return for the calendar years 1951, 1952 and 1953, in which he knowingly and intentionally understated his net income for said years.

2. Under the government's own evidence the monies allegedly received from John Schmidt in said years 1951, 1952 and 1953 are not taxable income to defendant and he was not required to report same because:

(a) Said monies were embezzled by defendant from the St. Louis Labor Health Institute in his official capacity as business manager.

(b) Defendant was under an immediate and unqualified obligation to repay said misappropriated monies at the time of their felonious taking.

(c) Defendant had void title to said monies and no affirmative action remained to be taken by said St. Louis Labor Health Institute to effectuate his legal obligation to repay said embezzled funds.

3. There is not sufficient evidence to show any intent on the part of the defendant to file false and fraudulent tax returns for the years 1951, 1952 and 1953 or to evade a substantial amount of income tax due the government for said years.

4. There is no substantive evidence in the record that the work done on defendant's house in the year 1951 by J. Shulman & Sons (and which was subsequently paid for by the St. Louis Labor Health Institute) was income to defendant and properly reportable on his 1951 income tax return for the reason that the only evidence in the record is that defendant had incurred a debt in this amount to J. Shulman & Sons and that the payments by the St. Louis Labor Health Institute to J. Shulman & Sons were without the knowledge or connivance of defendant.

5. The government failed to make a prima facie case of obstruction of justice because the proof and evidence adduced failed to show that the witness Schmidt was under subpoenae to testify before the Federal Grand Jury at any time mentioned in the indictment or that the witness Schmidt at said times desired to testify, intended to testify or had agreed to testify at the government's request before said Grand Jury.

6. The proof and evidence adduced failed to show that the witness Schmidt was a witness before said Grand Jury within the scope and purview of Section 1503, Title 18, U. S. C., on any of the dates alleged in said indictment.

7. The trial court erred in overruling defendant's motion for a mistrial and in overruling defendant's objection to the introduction of evidence pertaining to a former arrest of defendant not amounting to a felony conviction; the trial court erred in permitting the Assistant United States Attorney to interrogate the witness Schmidt concerning an arrest made of the defendant in February, 1954, which had no relation to the present charges.

8. The trial court erred in failing to permit the defendant's counsel properly and fully to impeach the witness Schmidt; defendant offered to prove the witness Schmidt's

bias and prejudice in favor of the prosecution and against the defendant and also his true motive in testifying that he destroyed certain records because of defendant's urging by showing that the witness Schmidt had deducted the payments to defendant Berra as commissions on his 1951, 1952 and 1953 Federal Income Tax returns, and therefore it was to the self-interest of the witness Schmidt to de that the payments to Berra were loans and to destroy his records concerning work done for the St. Louis Labor Health Institute and money received therefrom. The defendant also offered to prove that the witness Schmidt had been guilty of omitting items of income from his 1951, 1952 and 1953 Federal Income Tax returns and that, knowing this and that he himself was under a tax investigation, the witness Schmidt was biased against the defendant in favor of the government hoping to secure favorable treatment from the prosecution and was a subservient and facile witness in favor of the prosecution.

9. The trial court erred in allowing the introduction of irrelevant, immaterial and prejudicial evidence against this defendant when it permitted the United States Attorney to inquire of the witness Gibbons on cross-examination whether or not Teamsters' Local 688 was paying the costs of the defendant's defense. Such interrogation was also beyond the scope of the direct examination.

10. The trial court also erred in sustaining an objection by government counsel on defendant's redirect examination of the witness Gibbons to a question asking the witness Gibbons why Teamsters' Local 688 was paying the costs of defense for this defendant. The trial court erred initially by opening the door to the prosecution for such prejudicial evidence, but once having opened the door, the trial court should have allowed a reasonable explanation to have been made setting forth the reasons for the payment of his defense by Teamsters' Local 688.

11. The trial court erred in permitting the United States Attorney to inquire of the defendant Berra on cross-examination whether or not he had previously destroyed any records in 1954 because such evidence was irrelevant and

immaterial to any of the issues involved and tended to prejudice the minds of the jury against this defendant.

12. The trial court erred also in permitting the Assistant United States Attorney to use the defendant's prior testimony before the Federal Grand Jury to impeach defendant on the issue of whether or not he had previously destroyed any records on the ground that said issue was entirely a collateral issue, foreign to the indictment under which defendant was being tried, and the prosecution was thereby bound by defendant's previous denial that he destroyed any such records.

13. The trial court erred in permitting the United States Attorney to impeach the defendant by reading to the jury his prior refusal to answer certain questions before the same Federal Grand Jury which returned the indictment under which he was being tried because:

(a) No proper foundation had been laid for the reading of such prior Grand Jury testimony to the jury in the case at bar.

(b) Defendant's answers before said Federal Grand Jury were not contradictory or inconsistent with his testimony in the proceeding at bar.

(c) The reading of his refusal to answer certain questions before the Federal Grand Jury on self-incrimination grounds was an abridgment of his constitutional rights under the Fifth Amendment. No inference can be drawn from a defendant's refusal to testify before a Federal Grand Jury.

14. The trial court erred in failing to declare a mistrial at defendant's request when the United States Attorney, attempting to impeach defendant, read from his prior Grand Jury testimony certain statements that he had been jailed on a prior occasion for civil contempt for failing to produce certain books and records. The trial court erred in failing to grant defendant's motion for a mistrial and overruling defendant's motion to strike same for the reason that said prior Grand Jury testimony was read for the purpose of prejudicing the minds of the jury against this

defendant and said civil contempt had no relevancy or materiality to the issues involved in the instant proceeding.

15. The trial court erred in permitting the United States Attorney to tell the defendant to stop "making things up," and further erred in overruling the defendant's motion to strike same and to declare a mistrial on the ground that the statement by the United States Attorney was argumentative and tended to prejudice the minds of the jury against this defendant.

16. The trial court erred when, in response to the defense counsel's objection to the argumentative statement by the United States Attorney that the defendant was "making things up," the Court overruled said objection and further commented, "I think he is making things up," on the grounds that said statement by the trial court amounted to a comment on the evidence and credibility of the witness, was grossly inflammatory in regard to the defendant, invaded the province of the jury, and tended to prejudice and bias the jury against this defendant. Therefore, at the conclusion of this comment by the Court, defendant's motion for a mistrial should have been sustained and the trial court erred in overruling same.

17. The trial court erred in refusing to give defendant's requested Instruction No. 3 on the ground that under the government's evidence all the alleged items of income were embezzled and misappropriated from the St. Louis Labor Health Institute and were not properly reportable as income in defendant's 1951, 1952 or 1953 Federal Income Tax returns.

18. The trial court erred in its refusal to give defendant's requested Instruction No. 4 on the ground that under the government's evidence all the alleged items of income were embezzled and misappropriated from the St. Louis Labor Health Institute and were not properly reportable as income in defendant's 1951, 1952 or 1953 Federal Income Tax returns.

19. The trial court erred in its refusal to give defendant's requested Instructions No. 11 and No. 12 on the

grounds that under the Federal Rules of Criminal Procedure and the evidence adduced the jury might well have found the defendant guilty of a lesser crime, namely, a misdemeanor.

20. The trial court further erred in giving to the jury a prejudicial and argumentative charge in which the trial court summed up and commented on all the evidence favorable to the prosecution and minimized the evidence favorable to the defendant concerning the payments of John F. Schmidt to defendant Berra and defendant's alleged criminal intent in failing to report same on his 1951, 1952 and 1953 Federal Income Tax returns.

21. The trial court erred in instructing the jury on the applicable law concerning the obstruction of justice counts in that the trial court told the jury only that defendant Berra need have had reasonable grounds to believe Schmidt, a witness before a grand jury, and failed and neglected to tell the jury that Schmidt himself must have believed himself to be a witness and must have desired to testify, intended to testify, or had agreed to testify at the time of the alleged obstruction.

Respectfully submitted,

MARK M. HENNELLY,
MARK M. HENNELLY,
STANLEY M. ROSENBLUM,
408 Olive Street,
St. Louis 2, Missouri,
Attorneys for Defendant.

Order.

(Filed October 21, 1954, in the United States District Court.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,
vs.
Louis Berra,
Defendant.
No. 27857,
27866.

Hulen, Judge.

Motion of defendant for judgment of acquittal, or in the alternative, for a new trial, submitted by the parties and said motion overruled.

/s/ RUBEY M. HULEN,
Judge.

Memorandum on Motion for Bail.

(Filed November 5, 1954, in the United States District Court.)

United States District Court,
Eastern District of Missouri,
Eastern Division.

United States of America,
Plaintiff,
vs.
Louis Berra,
Defendant.
No. 27857
27866

Hulen, Judge.

We have for ruling defendant's motion for bail pending appeal in case No. 27866. This case was consolidated and tried with case No. 27857. Defendant was convicted on all

counts in both cases. Defendant was committed on the sentence in case No. 27866 only.

Defendant was convicted on three counts charging the filing of a false and fraudulent income tax return with intent to evade payment of taxes due on his income.

At the time defendant presented his motion for new trial we inquired of defendant's counsel if he desired to call the court's attention to any one of the assignments. Counsel declined to present oral argument and stated they had nothing to which they desired to direct the trial court's attention.

There are a number of assignments of error referred to in the motion for bail. We find them without substance.

I.

Defendant admittedly received moneys from John Schmidt which were not included in his tax returns. Defendant complains that his receipt of these funds constituted embezzlement and not income.

The Government's case, supported by direct and substantial evidence, was that the witness Schmidt, a painter, while doing work for the Labor Health Institute, entered into an agreement with defendant to present false claims for labor allegedly done for the welfare organization. The defendant then approved the false claims, as an officer of the Labor Health Institute, and as a result of the approval Schmidt was able to obtain the funds represented by the checks in payment of the false claims. Thereafter, and as a part of the agreement, Schmidt gave the money obtained, either by check or by cash, to the defendant. Failure of defendant to include these receipts in his tax returns forms the basis of two of the convictions complained of on this assignment. The sentences run concurrently on all three counts.

Defendant admitted getting substantially all the money which Schmidt said he paid to him. He claims that Schmidt sought him out and offered to lend him this money, without interest, security, or note, or promise of any definite time of repayment. There was no claim of repayment.

Under neither the Government's theory nor that of the defendant can the receipt of the funds by defendant be embezzlement. Generally speaking, embezzlement is the receipt by an agent, such as defendant, of money of his principal, and conversion of the funds to his own use. The funds must be received in the course of the employment or defendant be rightfully in possession of them and thereafter convert them to his own use. Admittedly the funds in this case went first to Schmidt. He manifestly obtained them by fraud and deceit. He never was lawfully entitled to them. Schmidt in some instances put the funds in his bank account. None of the funds came into defendant's possession lawfully or in the course of his employment. Defendant may be guilty of obtaining money of the welfare organization by a fraudulent scheme or device, but he could not be convicted of embezzlement.

II.

Defendant's second assignment goes to the charge in case No. 27857. In this case the sentence was suspended and defendant was placed on probation.

III.

Defendant complains that he was restricted in his cross-examination of the witness Schmidt, in his efforts to show bias and prejudice in favor of the plaintiff.

We gave the defendant complete latitude in his cross-examination of Schmidt as to how he accounted for the money he received from the Labor Health Institute in his income tax returns for the years the amounts were received. He showed the receipts in his returns as commissions to the defendant. We permitted cross-examination of Schmidt and other witnesses as to whether Schmidt was or had been under investigation by the Internal Revenue Department on his tax returns:

"Q. You don't remember whether or not you made out an honest return for that year, sir?

A. To my knowledge, yes.

Q. I want you to look at this return, sir.

Mr. Stanard: Your Honor, I object to this line of questioning concerning 1952.

The Court: Sustained. I was wondering when you would come to life. We are not trying this witness, we are trying the defendant.

Mr. Hennelly: Your Honor, I submit this is the type of examination which——

The Court: I have sustained the objection. You may go into the subject as to whether or not he included in his return these payments which he claimed he put on to the bills of the Labor Health Institute and gave the money to the defendant. Now, he said in his direct examination that he showed on his income tax return, he showed a credit, paying them to the defendant. That is the extent of your inquiry."

We did restrict the cross-examination as to other items in the tax return, wholly unrelated to the charges against the defendant because they were collateral matters and it is elementary that a witness cannot be impeached on collateral matters.

IV.

Defendant called as a witness a man named Gibbons who was an officer of the same union as the defendant and also an officer of the Labor Health Institute. It was evident he was favorably disposed to the defendant. On cross-examination, over objection, he testified that the union of which he was an officer was paying for the defense in this case. Defendant complains of this ruling. We think this evidence was admissible as showing the interest of the witness in the outcome of the case.

V.

Defendant took the stand and testified fully in his own defense. It developed on cross-examination that he had been called before the grand jury and there had refused to testify with regard to certain questions regarding the Labor Health Institute on the ground that his answers might incriminate him. Defendant assigns this cross-

examination as error. The exact point was in the case of *Viereck vs. United States*, 139 F. 2d 847. There the Court of Appeals for the District of Columbia approved the Government's cross-examination. Certiorari was denied by the Supreme Court, 321 U. S. 794. In the case of *Raffel vs. United States*, 271 U. S. 494, the Supreme Court laid down the rule permitting a broad field of cross-examination of a defendant who voluntarily takes the witness stand in his own defense.

VI.

The witness Schmidt, in fixing the time of a certain telephone conversation with the defendant Berra, referred to an occasion when Berra was arrested. It was made clear to the jury that the arrest had nothing to do with the instant case and no further reference was made to it in the trial. There was no prejudice to the defendant in the remarks complained of.

Order.

Defendant's motion for bail pending appeal is denied.

RUBEY M. HULEN,
Judge.

Judgment and Order of Probation.

United States District Court
For the
Eastern District of Missouri Eastern Division.

United States of America
v.
Lou Berra.
No. 27857 (2).

Filed October 28, 1954.

On this 28th day of October, 1954, came the attorney for the government and the defendant appeared in person and with Mark Hennelly, his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offenses of unlawfully, feloniously and corruptly endeavor to influence a witness who was to appear before the Grand Jury and to obstruct, influence and impede the due administration of justice as charged in cts. 1 and 2 of indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that imposition of sentence upon defendant under each of counts one and two of the indictment herein be and the same is hereby suspended and defendant placed on probation for a period of Five Years, which term of probation shall begin and run consecutively and not concurrently with the term of imprisonment imposed on defendant in Cause No. 27866, and with the special condition that during the term of probation the defendant shall not directly or indirectly hold any office in or employment by any organization of labor or any organization affiliated, or sponsored by, a labor union or a labor organization. Such conditions shall not prevent defendant from being a member of any labor organization.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

/s/ RUBEY M. HULEN,
United States District Judge.

/s/ JAMES J. O'CONNOR,
Clerk.

Judgment and Commitment.

United States District Court,
For the
Eastern District of Missouri,
Eastern Division.

Filed October 28, 1954.

United States of America,
v.
Louis (Lou) Berra.
No. 27866 (2).

On this 28th day of October, 1954, came the attorney for the government and the defendant appeared in person and with Mark M. Hennelly, his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offenses of wilfuly and knowingly attempting to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar years 1951, 1952 and 1953, respectively as charged in Counts 1, 2, and 3 of indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) Years as to and under the charge as contained in count one of the indictment herein; Four (4) Years as to and under the charge as contained in Each of counts two and three of the indictment herein; such terms of imprisonment to run concurrently with each other as well as concurrently with term of imprisonment imposed under count one of the indictment herein.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ RUBEY M. HULEN,
United States District Judge.

/s/ JAMES J. O'CONNOR,
Clerk.

Order Denying Application for Bail.

(Filed in the United States Court of Appeals for the Eighth Circuit on November 13, 1954.)

United States Court of Appeals
for the Eighth Circuit.

September Term, 1954.

Louis Berra, Appellant,
vs. No. 15,214.
United States of America.

Louis Berra, Appellant,
vs. No. 15,215.
United States of America.

Appeals from the United States District Court for the Eastern District of Missouri.

Motion of appellant in these causes for admission to bail pending determination of his appeals to this Court taken from the decision of the United States District Court for the Eastern District of Missouri, heretofore submitted, has been considered by the Court and it is now here Ordered that same be and is hereby denied.

November 13, 1954.

Notice of Appeal.

(Filed October 28, 1954, in the United States District Court.)

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

United States of America, Plaintiff, vs. Louis Berra, Defendant.	No. 27857, 27866, (Consolidated Causes) Criminal.

1. Name and address of Appellant: Louis Berra, 3120 Hampton Avenue, St. Louis, Missouri.

2. Name and address of Appellant's Attorneys: Mark M. Hennelly, 1832 Arcade Building, St. Louis, Missouri; Stanley M. Rosenblum and Merle L. Silverstein, 408 Olive Street, St. Louis, Missouri.

3. Offenses: Cause No. 27857, violation of Section 1503, Title 18, U. S. C. (Obstruction of justice); Cause No. 27866, violation of Section 145 (b), Title 26, U. S. C. (Income tax evasion).

4. Judgment and Order Appealed From:

(a) In Cause Number 27857, judgment and order entered on October 28, 1954, on the finding of guilty by the jury, suspending imposition of sentence and placing defendant on probation for a period of five years, a special condition of which probation prohibits defendant from acting as an officer, representative, or employee of any labor union or its affiliates.

(b) In Cause Number 27866, judgment and sentence of the court, on the finding of guilty of defendant by the jury, committing defendant to the custody of the Attorney General for a period of four years on each of three counts, the sentences on the second and third counts to run concurrently with that on the first count.

5. Name of Institution where now Confined: Municipal Jail of the City of St. Louis.

The above named Appellant hereby appeals to the United States Court of Appeals for the Eighth Circuit from the above stated judgment; dated October 28, 1954.

STANLEY M. ROSENBLUM,
STANLEY M. ROSENBLUM,
408 Olive Street,
St. Louis 2, Missouri,
Attorney for Appellant.

United States of America

vs.

Lou Berra

No. 27857 (2)

Clerk's Docket Entries.

1954

May 20—Indictment filed. On oral motion of U. S. Atty., order filed fixing appearance bond of deft. in the penal sum of $5000.00 to be taken before and approved by U. S. Commissioner, etc. On praecipe filed by U. S. Atty., capias issued for deft. returnable forthwith.

May 24—Appearance bond of deft. in penal sum of $5000.00 given before and approved by U. S. Commissioner and made returnable in Court No. 2 on May 27, 1954, filed.

May 25—Warrant showing Marshal's return thereon (executed), filed.

May 27—Stanley M. Rosenblum enters his appearance as atty. for deft. On oral motion, deft. granted to June 3, 1954 to file contemplated motions, the same to be heard on said date. Cause passed for arraignment to June 3, 1954.

June 3—Deft. appears with Stanley M. Rosenblum, his atty. Motion of deft. for discovery and inspection and for the production of books, papers, documents and other objects, filed, submitted and passed for order. On arraign-

ment deft. enters plea of not guilty to each of counts 1 and 2 of ind. Cause thereupon set for trial on September 27, 1954.

June 16—Stipulation of parties filed as to inspection, etc. by deft. of documentary evidence specified therein pursuant to deft's. motion herein.

September 20—Entry of appearance of Mark M. Hennelly as associate counsel for deft. filed.

September 27—Deft. having heretofore entered plea of not guilty to charges contained in each of indictments 27866 and 27857, and said causes having been heretofore consolidated for purposes of trial, and same having been heretofore set for trial, parties announce ready. The Court directs the empaneling of an alternate juror in addition to the trial jury; whereupon the empaneling of trial jury and alternate juror is commenced and concluded. Thereupon trial jury is sworn. Mr. Harold E. Knight, Sr. having qualified and selected as alternate juror, said alternate is sworn. Whereupon the introduction of evidence in chief on behalf of pltff. on consolidated trial of deft. under charges contained in aforesaid indictments commenced but not concluded and further proceedings postponed until tomorrow at 10:00 a. m.

September 28—Again come parties, jury and alternate juror empaneled and sworn on trial of deft. under charges contained in indictments 27866 and 27857 consolidated for purposes of trial; whereupon introduction of evidence in chief on behalf of pltff. on such trial is resumed, but not concluded and further proceedings postponed until tomorrow at ten a. m.

September 29—Again come parties; jury and alternate juror empaneled and sworn on trial of deft. under indictments 27866 and 27857 consolidated for purpose of trial; whereupon the introduction of evidence in chief on behalf of pltff. on such consolidated trial is resumed and concluded. Motion of deft. for judgment of acquittal on each of counts contained in indictment 27866 at close of pltff's. case in chief, and separate motion of deft. for judgment of acquittal on both counts of indictment 27857

at close of pltff's case filed, submitted and each of aforesaid motions overruled. Thereupon the introduction of evidence on behalf of deft. is commenced but not concluded and further proceedings postponed until tomorrow at ten a. m.

September 30—Again come parties, jury and alternate juror empaneled and sworn on trial of deft. under charges contained in indictments 27866 and 27857 consolidated for purpose of trial; whereupon the introduction of evidence on behalf of deft. on such consolidated trial is resumed and concluded. Motion of deft. for judgment of acquittal at close of entire case on each of counts of ind. No. 27866, as well as separate motion of deft. for judgment of acquittal at close of entire case on both counts of ind. 27857, filed and said motions submitted and overruled. After final arguments of counsel for respective parties, further proceedings on trial postponed until tomorrow at ten a. m.

October 1—Again come parties, jury and alternate juror heretofore empaneled and sworn on trial of deft. under charges contained in inds. Nos. 27866 and 27857 consolidated for purposes of trial; whereupon such consolidated trial is resumed and the jury, after being charged by the Court, retires to consider its verdicts, which separate verdicts in aforesaid causes it afterwards returns into Court finding the deft. guilty as charged in each of counts one, two and three of ind. No. 27866, and finding deft. guilty as charged in each of counts one and two of ind. No. 28758. Verdicts filed. On oral application of deft., imposition of sentences upon deft. under aforesaid findings & verdicts deferred to October 22nd, 1954 and deft. released on existing appearance bonds until such date. On motion, deft. granted to October 18, 1954 to file motion for new trial, and such motion so filed set for hearing on October 21st, 1954.

October 18—Motion of deft., jointly in causes 27857 and 27866 consolidated for trial, for judgment of acquittal or in the alternative for a new trial, filed.

October 19—Cause set for October 22nd, 1954, passed for hearing to 2:00 p. m. on said date.

October 21—Motion of deft. for judgment of acquittal, or in the alternative, for a new trial, submitted by parties and said motion overruled.

October 22—Deft. appears with Mark M. Hennelly, his atty., for imposition of sentence upon verdict returned by jury on trial of cause finding deft. guilty as charged in each of counts 1 and 2 of ind. On the Court's own motion, imposition of sentence on deft. thereunder further deferred to October 28, 1954 and deft. released on his existing appearance bond until such date.

October 28—Deft. appears with Mark M. Hennelly, his atty., for imposition of sentence under separate verdicts heretofore returned by the jury in each of above cases finding deft. guilty as charged in each of counts 1, 2 and 3 in cause 27866 and finding deft. guilty as charged in each of counts 1 and 2 in cause 27857. Deft. under count 1 in cause 27866 committed to custody of Atty. General for imprisonment for a term of 4 years and deft. under each of counts 2 and 3 of said cause committed to custody of Atty. General for imprisonment for a term of 4 years, such terms of imprisonment to run concurrently with each other as well as concurrently with term of imprisonment imposed under count 1. Imposition of sentence under verdict of guilty returned to each of counts 1 and 2 in cause 27857 suspended and defendant placed on probation for a period of 5 years, which term of probation shall begin and run consecutively and not concurrently with the term of imprisonment imposed on deft. in cause 27866, and with the special condition that during the term of probation the deft. shall not directly or indirectly hold any office in or employment by any organization of labor or any organization affiliated, or sponsored by, a labor union or a labor organization. Such conditions shall not prevent deft. from being a member of any labor organization. Deft's motion for bail pending appeal filed and submitted without argument.

October 28—Deft's. notices of appeal from judgment and sentence in consolidated causes Nos. 27857 and 27866 filed and duplicate copies of said notice, together with

certified copy of docket entries tansmitted to Clerk of U. S. Court of Appeals, 8th Circuit.

I, James J. O'Connor, Clerk, U. S. District Court, Eastern District of Missouri, do hereby certify the above is a true and correct copy of the relevant docket entries in cause.

JAMES J. O'CONNOR,
Clerk,

By JOHN JARVIS,
Deputy Clerk.

The United States of America
vs.
Louis (Lou) Berra

No. 27866

Clerk's Docket Entries.

1954

May 28—Indictment filed. On oral motion of U. S. Atty., order filed fixing appearance bond of defendant in the penal sum of $5,000.00 to be taken before a U. S. Commissioner and made returnable forthwith, etc. On praecipe filed by U. S. Atty., capias issued for apprehension of defendant returnable forthwith.

June 1—Appearance bond of deft. in the penal sum of $5000.00 given before a U. S. Commissioner for his appearance before Court No. 2 on June 7, 1954, and thereafter filed.

June 2—Warrant (Berra) showing Marshal's return thereon (executed), filed.

June 7—Deft. appears with Stanley M. Rosenblum, his atty., and on arraignment enters plea of not guilty to each of counts 1, 2 and 3 of ind. herein. On oral application, deft. granted to June 14, 1954 to file any contemplated motions, such motions so filed set for hearing on June 14, 1954.

June 11—Motion of deft. for bill of particulars with endorsed request for oral argument thereon, and separate motions of deft. for discovery, inspection, and production of books, etc., and for consolidation of within cause with criminal cause No. 27857 (2) of this Court, filed.

June 11—Motion of deft. to dismiss indictment filed.

June 14—Motion of deft. for bill of particulars; for discovery, inspection and production of books, etc., and for consolidation of within cause with criminal case 27857 (2) of this Court, and motion of deft. to dismiss, passed for hearing to June 25, 1954.

June 25—Parties appearing by counsel; motion of deft. to dismiss, withdrawn by leave.

Motion of deft. for consolidation of within cause No. 27866 with criminal cause No. 27857 (2) of this Court submitted and sustained and said causes consolidated for trial.

Motion of deft. for discovery and inspection and production of books, etc., submitted and denied as to paragraphs 7 and 8 of motion, and sustained in all other respects.

Motion of deft. for bill of particulars submitted and sustained.

Cause set for trial September 27, 1954.

September 13—Pltff's bill of particulars filed.

September 20—Entry of appearance of Mark M. Hennelly as associate counel for deft filed.

September 27—Deft. having heretofore entered plea of not guilty to charges contained in each of indictments 27866 and 27857 and said causes having been heretofore consolidated for purposes of trial, and same having been heretofore set for trial, parties announce ready. The Court directs the empaneling of an alternate juror in addition to the trial jury, whereupon the empaneling of trial jury and alternate juror is commenced and concluded. Thereupon trial jury is sworn and Mr. Harold F. Knight, Sr., having been qualified and selected as

alternate juror, said alternate is sworn. Whereupon the introduction of evidence in chief on behalf of pltff. on consolidated trial of deft. under charges contained in aforesaid inds. commenced but not concluded and further proceedings postponed until tomorrow at ten a. m.

September 28—Again come parties, jury and alternate juror empaneled and sworn on trial of deft. under charges contained in indictments 27866 and 27857 consolidated for purposes of trial; whereupon introduction of evidence in chief on behalf of pltff. on such trial is resumed, but not concluded and further proceedings postponed until tomorrow at ten a. m.

September 29—Again come parties; jury and alternate juror empaneled and sworn on trial of deft. under indictments 27866 and 27857 consolidated for purposes of trial; whereupon the introduction of evidence in chief on behalf of pltff. on such consolidated trial is resumed and concluded. Motion of deft. for judgment of acquittal on each of counts contained in indictment 27866 at close of pltff's case in chief, and separate motion of deft. for judgment of acquittal on both counts of indictment 27857 at close of pltff's case, filed, submitted and each of aforesaid motions overruled. Thereupon the introduction of evidence on behalf of deft. is commenced but not concluded and further proceedings postponed until tomorrow at ten a. m.

September 30—Again come parties, jury and alternate juror empaneled and sworn on trial of deft. under charges contained in indictments 27866 and 27857 consolidated for purposes of trial; whereupon the introduction of evidence on behalf of deft. on such consolidated trial is resumed and concluded. Motion of deft. for judgment of acquittal at close of entire case on both counts of indictment 27857, filed and said motions submitted and overruled. After final arguments of counsel for respective parties, further proceedings on trial postponed until tomorrow at ten a. m.

October 1—Again come parties, jury and alternate juror heretofore empaneled and sworn on trial of deft. under charges contained in inds. Nos. 27866 and 27857 consoli-

dated for purposes of trial; whereupon such consolidated trial is resumed and the jury, after being charged by the Court, retires to consider its verdicts, which separate verdicts in aforesaid causes it afterwards returns into court finding the deft. guilty as charged in each of counts one, two and three of ind. No. 27866, and finding deft. guilty as charged in each of counts one and two of ind. No. 27857. Verdicts filed. On oral application of deft., imposition of sentence upon deft. under aforesaid findings and verdicts deferred to October 22nd, 1954 and defendant released on existing appearance bonds until such date. On motion, deft. granted to October 18th, 1954 to file motion for new trial, and such motion so filed set for hearing on October 21st, 1954.

October 18—Motion of deft., jointly in causes 27857 and 27866 consolidated for trial, for judgment of acquittal or in the alternative for a new trial, filed.

October 19—Cause set for October 22, 1954, passed for hearing to 2:00 p. m. on said date.

October 21—Motion of deft. for judgment of acquittal, or in the alternative, for a new trial, submitted by parties and said motion overruled.

October 22—Deft. appears with Mark M. Hennelly, his atty., for imposition of sentence under verdict heretofore returned by jury on trial of cause finding deft. guilty as charged in each of counts 1, 2 and 3 of ind. Upon Court's own motion, imposition of sentence on deft. thereunder further deferred to October 28, 1954 and deft. released on his existing appearance bond until such date.

October 28—Deft. appears with Mark M. Hennelly, his atty. for imposition of sentence under separate verdicts heretofore returned by the jury in each of above cases finding deft. guilty as charged in each of counts 1, 2 and 3 in cause 27866 and finding deft. guilty as charged in each of counts 1 and 2 in cause 27857. Deft. under count 1 in cause 27866 committed to custody of Atty. General for imprisonment for a term of 4 years and deft. under each of counts 2 and 3 of said cause committed to custody of Atty. Genl. for imprisonment for a term of 4 years, such terms of imprisonment to run concurrently

with each other as well as concurrently with term of imprisonment imposed under count 1. Imposition of sentence under verdict of guilty returned to each of counts 1 and 2 in cause 27857 suspended and deft. placed on probation for a period of 5 years which term of probation shall begin and run consecutively and not concurently with the term of imprisonment imposed on deft. in cause 27866, and with the special condition that during the term of probation, the deft. shall not directly or indirectly hold any office in or employment by any organization of labor or any organization affiliated, or sponsored by, a labor union or a labor organization. Such conditions shall not prevent deft. from being a member of any labor organization. Deft's motion for bail pending appeal filed and submitted without argument. (Hulen, J.)

October 28—Deft's notice of appeal from judgment and sentence in consolidated causes Nos. 27857 (2) and 27866 (2) filed and duplicate copies of said notice, together with certified copy of docket entries transmitted to Clerk of U. S. Court of Appeals, 8th Circuit.

I, James J. O'Connor, Clerk of the District Court of the United States, within and for the Eastern District of Missouri, hereby certify the above and foregoing is a true and correct copy of the relevant docket entries in cause.

JAMES J. O'CONNOR,
Clerk,
By JOHN JARVIS,
Deputy Clerk.

IN THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT

No. 15,214

LOUIS BERRA, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Eastern District of Missouri

No. 15,215

LOUIS BERRA, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Eastern District of Missouri

Stanley M. Rosenblum (Mark M. Hennelly was with him on the brief), for appellant.

Charles H. Rehm, Assistant United States Attorney, and William K. Stanard, II, Assistant United States Attorney (Harry Richards, United States Attorney, was with them on the brief), for appellee.

OPINION—April 22, 1955

Before Gardner, Chief Judge, and Woodrough and Thomas, Circuit Judges

WOODROUGH, Circuit Judge.

Appellant was convicted in No. 15,214, on both counts of a two-count indictment charging him with corruptly endeavoring to influence a witness before a grand jury and obstruct, influence and impede the due administration of justice, in violation of Title 18, U.S.C.A., section 1503. He was also convicted in No. 15,215 on all counts of an indictment charging income tax evasion for the years 1951,

1952 and 1953, in violation of Title 26, U.S.C.A., section 145(b). The two cases were consolidated for the jury trial, a verdict of guilty resulting in both cases. Appellant was sentenced to four years' imprisonment on each of the three counts in No. 15,215, the sentences on all counts to run concurrently. In No. 15,214, the court suspended imposition of sentence and placed appellant on probation for five years, said probation to begin and run consecutively with the term of imprisonment imposed in No. 15,215, and with the special condition that appellant shall not, during the period of probation, hold any office in a labor union or labor organization. The motion for judgment of acquittal or in the alternative for a new trial having been overruled, appellant brought this appeal.

The first point urged by appellant is that the trial court erred in overruling his motion for judgment of acquittal on the income tax evasion counts in No. 15,215 for the reason that the monies allegedly constituting income to appellant were, under the government's own proof, funds embezzled from his employer and therefore did not constitute taxable income to him. Appellant also assigns as error the trial court's failure to give his requested instructions to that effect.

The evidence on the trial below, which was not in dispute except as noted hereinafter, showed that during the years 1951, 1952 and 1953, appellant was the business manager [1] of the St. Louis Labor Health Institute, a nonprofit organization furnishing free medical aid to members of Teamsters' Local 688 A. F. of L., and their families. The Labor Health Institute is operated on funds collected from employers who maintain collective bargaining agreements with Local 688. Appellant was authorized, as business manager of the Labor Health Institute, to approve payment of bills incurred by the organization and to draw and sign checks therefor. The checks were required to be countersigned by another employee. In 1949 the Labor Health Institute contracted with J. Shul-

[1] Although appellant was officially business manager only until September, 1952, he performed the same duties for the remainder of 1952 and during 1953.

man and Sons Contracting Company for extensive alteration work on its premises in St. Louis. The general contractor subcontracted the painting work to one John Schmidt. In 1950, after the original painting contract was completed, Schmidt was called back by the Labor Health Institute for further work. It was at this time, Schmidt testified, that appellant approached him with a plan whereby he, Schmidt, would submit padded bills to the Labor Health Institute by overstating his amount of labor performed, appellant would approve the bills and issue payment to Schmidt, and then Schmidt would return the amount of overpayment to appellant. Schmidt testified, and the government introduced some of his checks in substantiation, that he paid over to appellant some $5,000 under this arrangement during the three years covered by the indictment. He testified that he deducted these payments as commissions in computing his own income tax returns. During these same three years he testified that he did approximately $2,500 to $3,000 worth of painting at appellant's home which he charged to and received payment for from the Labor Health Institute. The evidence also showed that in 1951 a subcontractor purchased materials for and performed labor at appellant's home for which he was paid some $1,500 by J. Shulman and Sons Contracting Company, who in turn billed and received payment of that amount from the Labor Health Institute. These amounts constituted the alleged unreported income received by appellant during the three years in question.

Appellant took the stand in his own behalf and did not deny receiving the money Schmidt claimed to have paid him. He insisted, however, that these payments were loans and that he had later partially repaid Schmidt. He further testified that he had never requested Schmidt to submit padded labor bills to the Labor Health Institute or that there had ever been any such arrangement between the two. With respect to the $1,500 collected by J. Shulman and Sons Contracting Company from the Labor Health Institute for material furnished and labor performed at appellant's home, he testified that he never requested Labor Health Institute be billed for that, and had no knowledge

of the fact that it was so billed. Al Shulman testified that the erroneous billing was the fault of his company, not appellant, and that as a result of the grand jury investigation appellant paid him for the work and materials and he repaid the Labor Health Institute.

Appellant does not here contend that the jury was not warranted, under the evidence presented, in finding that the monies paid over to him by Schmidt were not loans. His position, as previously stated, is that all of the unreported funds received during the years in question were embezzled from his employer Labor Health Institute and therefore, under the decision of the Supreme Court in *Commissioner* v. *Wilcox*, 327 U.S. 404, did not constitute taxable income to him.

The Supreme Court, however, in its later decision in *Rutkin* v. *United States*, 343 U.S. 130, expressly limited its holding in the *Wilcox* case to the facts there existing. And we do not think the facts in the present case bring it within the scope of the Wilcox decision. The prosecution proved, and the appellant admitted, that the monies he received came, not from his employer Labor Health Institute, but from Schmidt. That this was not a case of embezzlement was recognized by the trial court when, in ruling on appellant's motion for bail, it said:

"Under neither the Government's theory nor that of the defendant can the receipt of the funds by defendant be embezzlement. Generally speaking, embezzlement is the receipt by an agent, such as defendant, of money of his principal, and conversion of the funds to his own use. The funds must be received in the course of the employment or defendant be rightfully in possession of them and thereafter convert them to his own use. Admittedly, the funds in this case went first to Schmidt. He manifestly obtained them by fraud and deceit. He never was lawfully entitled to them. Schmidt in some instances put the funds in his bank account. None of the funds came into defendant's possession lawfully or in the course of his employment. Defendant may be guilty of obtaining money of the welfare organization by a fraudulent scheme or device, but he could not be convicted of embezzlement."

We agree.

From the record as a whole we are convinced that the monies received by appellant from Schmidt constituted taxable income under the test laid down in the *Rutkin* case, *supra*, and followed by this court in *Marienfeld* v. *United States*, 8 Cir., 214 F.2d 632: "An unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it." That appellant had such control over the funds received from Schmidt cannot be doubted on this record. The trial court was not in error, therefore, in overruling appellant's motion for judgment of acquittal or in refusing to give his requested instructions pertaining to the embezzlement theory.

It is next argued that the trial court committed prejudicial error in unduly restricting cross-examination of Schmidt, the principal witness for the government. On direct examination Schmidt testified that at appellant's insistence he had destroyed his check stubs, cancelled checks, and daily work sheets reflecting his payments to appellant, but did not destroy his cancelled checks of 1952 and 1953 reflecting such payments. The government introduced in evidence the working papers of Schmidt's 1951 income tax return to prove his claimed pay-offs to appellant in that year. On cross-examination appellant sought to discredit the witness by introducing in evidence a check of the Labor Health Institute in the amount of $1160.60, dated February 9, 1951, and made payable to Schmidt, which did not appear on his 1951 income tax working papers. Appellant also introduced, without objection, a photostatic copy of Schmidt's 1951 income tax return which also apparently did not include the $1160.60 check. When appellant attempted to cross-examine Schmidt on the correctness of his 1952 and 1953 income tax returns, however, the trial court sustained the government's objection that the matter was irrelevant and collateral to the issues being tried. Appellant offered to prove that Schmidt had omitted certain items of income in his 1952 and 1953 tax returns and that by reason thereof the witness was biased, prejudiced, and interested; that he was under income tax investigation;

and that the destruction of his records inured to his own benefit.

The scope of cross-examination is within the judicial discretion of the trial court. *Myres* v. *U.S.*, 8 Cir., 174 F.2d 329; *Holmes* v. *U.S.*, 8 Cir., 134 F.2d 125; *Hewitt* v. U.S., 8 Cir., 110 F.2d 1. We are not prepared to say the trial court abused its discretion in this case. Schmidt had testified on direct examination that he was not under investigation for income tax evasion and that no promises had been made to him in respect thereto. This was fully explored on cross-examination. Schmidt had also testified that the payments made to appellant were credited as commissions on his tax returns and his 1951 income tax working papers showed that they had been so credited. In sustaining the objection to questioning concerning the correctness of Schmidt's 1952 and 1953 income tax returns, the court ruled:

"You may go into the subject as to whether or not he included in his return these payments which he claimed he put on to the bills of the Labor Health Institute and gave the money to the defendant. Now, he said in his direct examination that he showed on his income tax return, he showed a credit, paying them to the defendant. That is the extent of your inquiry."

To have permitted further questioning as to other items of Schmidt's income tax returns would have the tendency of confusing the issue before the jury. The appellant, not witness Schmidt, was on trial charged with evading taxes and appellant's income tax returns were the only ones pertinent to the issue. Further, inquiry along this line would have served to unreasonably prolong the trial, another proper consideration before the court in making its ruling. We hold that no abuse of discretion has been shown on the part of the trial court in limiting cross-examination of the witness Schmidt.

Appellant also complains that the prosecution was permitted to put appellant's character in issue in its case in chief. An excerpt from the record is set out to show how this alleged error occurred:

"Q. (Witness Schmidt was asked when appellant requested him to destroy his records).

"A. Well, he was constantly after me to ask me why I kept that daily work sheet, and I told him I kept that for my records. He constantly told me to get rid of them or, oh, I remember very closely after Mr. Berra was arrested, why he called me up, and that was on George Washington's birthday, the 22nd of February.

"Q. Now, will you tell the jury what the conversation was with Mr. Berra on George Washington's Birthday?

"A. He called me up and asked me——

(At this point the court called a recess).

After recess.

"The Court: This witness was asked to describe a conversation on the 22nd of February, is that correct?

"A. That is right.

. . . . . .

"The Court: Just a moment. I understood you to say it was after the defendant had been arrested. Did you say that?

"A. No. No. I did say it, but that is not correct.

"The Court: You better clear that up before you get through your case, because that doesn't correspond with the indictment. It is very material.

"Q. Mr. Schmidt, you have mentioned, I believe, before the recess, something about the defendant's arrest, that has nothing to do with this case, or with this indictment at all?

"A. None whatsoever."

This is the extent of the testimony upon which prejudicial error is predicated. It clearly appears that the witness Schmidt, a layman unversed in judicial rules of evidence, inadvertently and innocently referred to an arrest of appellant in attempting to fix the time of a certain event. There is not the slightest intimation that the fact of appellant's prior arrest was mentioned intentionally, maliciously, or at the prompting of the prosecuting attorney. It was simply such an immaterial incident as can and does sometimes occur during a trial. The incident is closely analogous to one that occurred in the case of *Means* v. *United States*, D.C., 65 F.2d 206, where a prosecution wit-

ness testified that defendant had told her he had been in prison. The appellate court, in holding the admission of this evidence was not error, said: "It is plain that this statement was not brought into the evidence for the purpose of reflecting upon appellant's reputation or character, but was purely incidental to the testimony relating to the conversation between the witness and appellant, which necessarily disclosed the fact that appellant at one time had been an inmate in the Atlanta Penitentiary." Appellant here, in seeking a reversal of this case, relies on *United States* v. *James*, 2 Cir., 208 F.2d 124, wherein the court held that the admission in evidence in the government's case in chief of defendant's prior arrest was reversible error. But in that case the testimony concerning defendant's prior arrest came from the lips of a government narcotics officer, who it may be assumed, was more familiar with courtroom rules of evidence than was witness Schmidt in the present case. Admittedly, this distinction is a thin one, and to the extent that the holding in the *James* case may be inconsistent with our decision herein, we do not apply it. Under the circumstances disclosed in the record here, the admission into evidence of the testimony concerning appellant's prior arrest did not constitute prejudicial error.

Appellant next assigns error on the failure of the trial court to sustain his motion for judgment of acquittal on Count One in No. 15,214, the obstruction of justice indictment. Appellant contends that the evidence of the government was insufficient as a matter of law to prove that Schmidt was, during the time alleged in Count One of the indictment, a "witness" within the intendment of section 1503, 18 U.S.C.A. Count One of the indictment charged, and the government's evidence showed, that appellant's endeavors to influence Schmidt to destroy his records pertaining to Labor Health Institute transactions were made during the period of February 21-23, 1954. Schmidt testified that it was almost a month later, on March 18, 1954, that he first met the revenue agents who were conducting the investigation of the Labor Health Institute. And it was almost a month thereafter, on April 14, 1954, that Schmidt was subpoenaed and testified before the grand

jury. Although the offense charged in Count One allegedly occurred on February 21-23, 1954, Schmidt testified:

"I didn't even know on March 18 [1954] that I was going to have to testify. I had never told anybody on March 18th that I wanted to testify. I didn't tell anybody anything. I didn't express any desire to testify on March 18th."

The question of who is a "witness" within the scope and meaning of section 1503 has been before this court. In *Smith* v. *United States*, 8 Cir., 274 Fed. 351, the person defendant was charged with endeavoring to influence had testified in a case, was discharged and returned home, and had been requested to return for further testimony at the time defendant assaulted him. In disposing of the contention that the person was not under subpoena, and hence was not a "witness" within the meaning of the statute, this court said:

"The terms of the statute, the evil it was enacted to prevent, and the protection it was intended to provide, leave no doubt that under its true interpretation each of those who are subpoenaed to come, of those who are called and accept the call to come without subpoenaes, of those who are prompted to come by their interests, of those who expect to come, and of those who are selected and expected to come to testify in any case in any court of the United States, falls within the class described by the terms 'any witness, in any court of the United States,' in the section under consideration."

In *Walker* v. *United States*, 8 Cir., 93 F.2d 792, a case charging defendant with endeavoring to influence the testimony of a co-defendant in a pending action, this court held: "It was not necessary to prove that she [the co-defendant] had been subpoenaed. She was such a witness if she then intended to testify on the trial of the case then pending in the District Court. *Smith* v. *United States*, 8 Cir., 274 F. 351, 353. There is no evidence that she so intended. * * * She did not say she would testify. The government investigator did not ask her to testify. * * * There is no evidence that the government desired to use her as a witness, even if she should waive her immunity."

The decision in *Walker* v. *U. S.*, *supra*, is controlling here. The government adduced no evidence to show that on February 21-23, 1954, Schmidt intended, desired, or expected to testify before the grand jury or that the government had or would request him to testify. On the contrary, Schmidt testified that as late as March 18, 1954, he had no desire, intent, or expectation of testifying. On February 21-23, 1954, the only information Schmidt had concerning the grand jury investigation, as we view the record, was what appellant had told him. This is hardly sufficient to qualify him as a "witness" under the statute.

The government urges that the test is "whether or not the defendant has reasonable grounds to believe that the witness will be called before the grand jury, and whether the witness is so called." Such a test might be applicable in determining whether there was the required knowledge or notice on the part of the defendant to authorize a conviction under the statute. We need not now so decide. But we are cited to no case, and have found none, where such a test was used to determine whether a person was or was not a "witness" as that term is used in section 1503. *Odom* v. *United States*, 5 Cir., 116 F.2d 996, relied on and quoted in the government brief, does not, in our opinion, so hold. The quotation from the *Odom* case that: "The knowledge necessary is not absolute or direct knowledge that Stansbury [the witness] had testified or would testify; but information or a reasonably founded belief thereof is sufficient to make the requisite scienter; he being in fact a witness," quite obviously refers to the knowledge of the defendant, as evidenced by the preceding sentence, "Touching the knowledge of the accused, and their specific intent to deal with Stansbury as a witness, the question is closer." The court had no difficulty in the *Odom* case in determining that Stansbury was a witness as he had already testified in a case and was intending to return for another scheduled hearing at the time defendant assaulted him.

We conclude that the government wholly failed to prove that Schmidt was, at the time alleged in Count One of the indictment in No. 15,214, a "witness" within the meaning of section 1503 and that appellant's motion for judgment of acquittal on that count should have been granted. Since

appellant was placed on probation for five years on both counts in No. 15,214, our decision on this question becomes important in the event that probation is revoked and appellant brought before the court for sentencing. 18 U.S.C.A., section 3653.

Appellant also assigns as error the admission into evidence, for purposes of impeachment, of his prior grand jury testimony wherein he refused to answer certain questions on the grounds that such answers might tend to incriminate him. The refusal to give appellant's requested instruction to the effect that his failure to testify before the grand jury constituted no evidence of his guilt is also urged as error. Although this court has not had occasion to pass upon this precise question, courts which have done so have uniformly held that the admission of such testimony is proper. *Viereck* v. *U. S.*, D.C., 139 F.2d 847; *U. S.* v. *Klinger*, 2 Cir., 136 F. 2d 677; *U.S.* v. *Gottfried*, 2 Cir., 165 F.2d 360; *U. S.* v. *Groves*, 2 Cir., 122 F.2d 87. Also, see and compare the following: *Raffel* v. *U.S.*, 271 U.S. 494 (evidence of defendant's failure to testify at first trial held proper); *U.S.* v. *Mortimer*, 2 Cir., 118 F.2d 266 (evidence of defendant's failure to appear before grand jury held proper); *U.S.* v. *Buckner*, 2 Cir., 108 F.2d 921 (evidence of defendant's refusal to testify before Securities and Exchange Commission held proper); *Tomlinson* v. *U.S.*, D.C., 93 F.2d 652 (prosecutor's comment upon defendant's failure to testify before grand jury, and upon defendant's explanation thereof, held proper). The rule of law to be drawn from all these cases is that where a defendant elects to take the stand in his own behalf he thereby waives his privilege of immunity and becomes subject to cross-examination and impeachment the same as any other witness. We discern nothing unjust or unfair in this rule. It must be held, therefore, that the admission into evidence of appellant's grand jury testimony was not improper. It was also not error to refuse the requested instruction since the court had made it clear during the trial that the evidence was being admitted to contradict appellant's position taken on the witness stand.

Appellant next contends that the condition imposed in the order of probation in No. 15,214, to-wit, "that during the term of probation the defendant shall not directly or

indirectly hold any office in or employment by any organization of labor or any organization affiliated, or sponsored by, a labor union or a labor organization. Such conditions shall not prevent defendant from being a member of any labor organization,'' was beyond the authority of the sentencing court and ought to be expunged. It seems rather anomalous to us that a person should complain of such an order of probation when it was within the lawful authority of the trial court to have given a sentence of ten years imprisonment and $10,000 fine under the two counts of the indictment, 18 U.S.C.A., section 1503. However that may be, appellant's argument that the condition imposed in the order of probation constituted an unlawful invasion of his right to earn a living is untenable. The trial court was of the opinion that the rehabilitation of appellant would proceed more effectively if he disassociated himself from all union organizational and administrative activity during the period of probation. Under the provisions of 18 U.S.C.A., section 3651, the trial court "* * * may suspend the imposition or execution of sentence and place the defendant on probation for such period [not exceeding five years] and upon such terms and conditions as the court deems best.'' The granting of probation and the terms and conditions thereof are matters clearly discretionary with the sentencing court. No abuse of discretion has been shown here.

Appellant's final contention on this appeal is that the trial court erred in refusing to instruct the jury, on the income tax evasion counts in No. 15,215, that it could find appellant guilty of the lesser offense contained in section 3616(a) 26 U. S. C. A. This point has been decided adversely to appellant's contention by this court in *Dillon* v. *United States*, 8 Cir., 218 F.2d 97, and we make the same ruling on the point in this case so that appellant's record thereon is preserved.

The judgment and sentence on Count One in No. 15,214 are vacated and the cause of action set forth in that count is dismissed. Judgment and sentence on Count Two of No. 15,214 and Counts One, Two and Three in No. 15,215 are affirmed.

In United States Court of Appeals for the Eighth Circuit, September Term, 1954. Friday, April 22, 1955

No. 15214

Louis Berra, Appellant

vs.

United States of America

Appeal from the United States District Court for the Eastern District of Missouri

Judgment in Cause No. 15214—April 22, 1955

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment and sentence of the said District Court on Count One of the Indictment in this cause be, and the same are hereby, vacated, and the cause of action set forth in said Count is hereby dismissed.

And it is further Ordered and Adjudged by this Court that the judgment and sentence of the said District Court on Count Two of the Indictment in this cause be, and the same are hereby, affirmed.

In United States Court of Appeals for the Eighth Circuit, September Term, 1954. Friday, April 22, 1955

No. 15215

Louis Berra, Appellant,

vs.

United States of America

Appeal from the United States District Court for the Eastern District of Missouri

Judgment in Cause No. 15215—April 22, 1955

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Louis Berra, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

IN UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, September Term, 1954. Wednesday, April 27, 1955

No. 15214

LOUIS BERRA, Appellant

vs.

UNITED STATES OF AMERICA

Appeal from the United States District Court for the Eastern District of Missouri

ORDER STAYING ISSUANCE OF MANDATE IN CAUSE NO. 15214 —April 27, 1955

On Consideration of the motion of the appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

In United States Court of Appeals for the Eighth Circuit, September Term, 1954. Wednesday, April 27, 1955

No. 15215

Louis Berra, Appellant,

vs.

United States of America

Appeal from the United States District Court for the Eastern District of Missouri

Order Staying Issuance of Mandate in Cause No. 15215 —April 27, 1955

On Consideration of the motion of the appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

April 27, 1955.

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, October Term, 1955

No. 60

LOUIS BERRA, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed December 5, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted limited to question (2) presented by the petition for the writ which reads as follows:

> "(2) Whether in a prosecution under a felony indictment for tax evasion under § 145(b) of the 1939 Internal Revenue Code, the trial court is required by Rule 31 of the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under § 3616(a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether defendant committed the greater or lesser offense."

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The case is transferred to the summary calendar.

(5838-8)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954

No. 760

LOUIS BERRA,
Petitioner,
v.
UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. .....

LOUIS BERRA,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the respective judgments in the above-consolidated causes of the United States Court of Appeals for the Eighth Circuit, entered in these cases on April 22, 1955.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, pp. 29-42.

JURISDICTION.

The judgments of the Court of Appeals were entered on April 22, 1955 (Appendix, infra, pp. 44-45). The jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254 (1).

QUESTIONS PRESENTED.

(1) Whether in a federal criminal prosecution the government on its case-in-chief can introduce evidence of defendant's bad character by reference to a prior arrest of defendant unconnected with the instant charges and colorless as to identity, intent or previously conceived design.

(2) Whether in a prosecution under a felony indictment for tax evasion under Section 145 (b) of the 1939 Internal Revenue Code, the trial court is required by Rule 31 of the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under Section 3616 (a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether defendant committed the greater or lesser offense.

(3) Whether an employee (given the right to draw checks on his employer's bank account and control thereof) who draws checks thereon to satisfy personal obligations and who knowingly pays out his employer's money to an accomplice on overstated bills for labor, receiving back from the accomplice the amounts of

overstatements, is guilty of embezzlement and, therefore, not obligated to report such misappropriated funds as taxable income.

(4) Whether a defendant in a federal criminal prosecution who takes the stand in his own behalf may be impeached with his prior refusals to answer on the grounds of self-incrimination when he was called before the grand jury which indicted him and refused to answer for fear that he was a prospective defendant, and whether a defendant so impeached is entitled to a cautionary instruction telling the jury that his refusals to answer are not evidence of his guilt and are not to be considered in that regard.

(5) Whether upon a conviction of an employee of a labor-sponsored organization for endeavoring to obstruct the administration of justice, a condition of defendant's probation which prevents his employment by any labor or labor-affiliated organization is reasonable and represents an abuse of discretion.

STATUTES AND RULES INVOLVED.

The pertinent statutes and rules are printed in the Appendix, infra, p. 43.

STATEMENT.

The petitioner was convicted on both counts of a two-count indictment charging him with corruptly endeavouring to influence a witness before a grand jury and obstruct, influence and impede the due administration of justice, in violation of Title 18, U. S. C. A., Section 1503. He was also convicted on all counts of a three-count indictment charging income tax evasion for the years 1951,

1952, and 1953 in violation of Title 26, U. S. C. A., Section 145 (b). Both cases were consolidated for trial before a jury. Petitioner was sentenced to four years imprisonment on each of the three counts in the tax evasion case, the sentences on all counts to run concurrently. In the other case, the trial court suspended imposition of sentence and placed petitioner on probation for five years, said probation to begin and run consecutively with the term of imprisonment imposed in the tax evasion case, and with the special condition that petitioner shall not, during the period of probation, act as an officer, representative, or employee of any labor union or its affiliates (R. 233-239).

Petitioner during the years 1951, 1952, and 1953 was the business manager of the St. Louis Labor Health Institute, a non-profit organization furnishing free medical care to members of Teamsters' Local 688, A. F. of L., and their families (R. 51-54). The Labor Health Institute is operated on funds collected from employers who maintain collective bargaining agreements with Local 688 (R. 51). As business manager of the Labor Health Institute, petitioner controlled the organization's bank account (R. 120); he personally approved payment of all bills incurred by the Labor Health Institute and drew and signed the checks therefor (R. 55, 120, 128, 153). The checks were countersigned by another employee (R. 55, 120, 128). In 1949 the Labor Health Institute contracted with J. Shulman and Sons Contracting Company for extensive alteration work on its premises in St. Louis (R. 133). The general contractor subcontracted the painting work to one John Schmidt (R. 67, 79). In 1950, after the original painting contract was completed, Schmidt was called back by the Labor Health Institute for further work (R. 67). Schmidt testified that petitioner then approached him with a plan whereby he, Schmidt, would submit padded bills to the Labor Health Institute by overstating his amount of labor

performed; petitioner, knowing of Schmidt's overstatements, would approve the bills, sign and draw checks in his capacity as business manager on the organization's bank account to Schmidt, issue payment to Schmidt, and then Schmidt would return the amount of the overpayment to petitioner (R. 67). It was Schmidt's testimony, and some of his checks were introduced in substantiation, that petitioner had received some $5,000.00 under this arrangement during the years 1951, 1952, and 1953 (R. 71, 72). He testified that he deducted these payments as commissions on his own income tax returns (R. 70, 71). During these same three years Schmidt testified that he did approximately $2,500.00 to $3,000.00 worth of painting at petitioner's home which, with petitioner's knowledge and connivance, he charged in his billing to the Labor Health Institute and received payment in the same way; that is, petitioner approved his bill, knowing it was overstated, drew and signed the organization's check, and issued payment to Schmidt (R. 72, 73). The evidence also showed that in 1951 petitioner had the J. Shulman and Sons Contracting Company subcontract for certain concrete work at his home and build a knotty pine rathskellar in his basement (R. 57, 59-62, 136). The cost of this work (some $1,500.00) was recovered by the J. Shulman and Sons Contracting Company by billing it to the Labor Health Institute, securing petitioner's approval of the bills, and petitioner's issuing checks in payment, signed by him in his capacity as business manager and drawn on his employer's checking account (R. 135). These amounts constituted the alleged unreported income received by petitioner during the three years in question.

Petitioner took the stand in his own behalf and admitted receiving the money Schmidt claimed to have paid him (R. 144-146). He insisted, however, that these payments were loans and that he had later partially repaid Schmidt (R. 144-146). He denied the arrangement outlined by

Schmidt whereby petitioner would pay Schmidt's padded bills with Labor Health Institute funds (R. 145); he denied that he had used his employer's funds to pay for Schmidt's painting done at his home (R. 145). He denied any knowledge that the J. Shulman and Sons Contracting Company had billed the Labor Health Institute for the work at his home or that he had used the organization's funds to pay for the work (R. 149-150). He said that he learned of this misconduct by the Shulmans only after the grand jury investigation (R. 150). In connection with the charges against him for endeavouring to obstruct justice, he denied that he at any time had urged Schmidt to destroy any of his records or to lie before the grand jury (R. 146-149).

During the direct examination of the witness Schmidt who was the government's principal witness, a prior arrest of the petitioner was referred to within the hearing of the jury on three different occasions by the witness Schmidt, the trial judge, and the prosecutor, as follows (R. 73, 74):

> "Q. Now, Mr. Schmidt, you have testified that the defendant Berra asked you to destroy certain records. Did he ever, or can you fix in your mind the time when these efforts increased, if they ever did?
>
> A. Well, he was constantly after me to ask me why I kept that daily work sheet, and I told him I kept that for my records. He constantly told me to get rid of them, or, oh, I remember very closely after Mr. Berra was arrested, why he called me up, and that was on George Washington's Birthday, the 22nd of February.
>
> Q. Now, will you tell the jury what the conversation was with Mr. Berra on George Washington's Birthday?
>
> A. He called me up and asked me——

The Court: Just a moment. Before you go further, we will take the morning recess, right here. Announce a ten minute recess.

(11:17 a. m. Recess ten minutes.)

The Court: This witness was asked to describe a conversation on the 22nd day of February, is that correct?

A. That is right.

The Court: What year?

A. This year.

Q. I believe you testified that on Washington's Birthday, February 22, this year, 1954, the Defendant Lou Berra called you up; is that correct?

A. That is right. That is right.

The Court: Just a moment. I understood you to say it was after the defendant had been arrested. Did you say that?

A. No. No. I did say it, but that is not correct.

(Mr Stanard and Mr. Hennelly confer with the Court, off the record and out of the hearing of the jury.)

The Court: You better clear that up before you get through your case, because that doesn't correspond with the indictment. It is very material.

(Further discussion.)

The Court: Proceed.

Q. Mr. Schmidt, you have mentioned, I believe, before the recess, something about the defendant's arrest, that has nothing to do with this case, or with this indictment at all?

A. None whatsoever.

Mr. Hennelly: I am going to object to that, ask it be stricken and that the jury be instructed to disregard it, and that a mistrial be declared.

The Court: Overrled. Go ahead. Proceed. Proceed with your examination of the witness."

Petitioner's objection to the mention of his prior arrest, his request that the jury be instructed to disregard it and a mistrial be declared were overruled by the trial court without comment (R. 74).

On cross-examination of petitioner, the government was permitted to impeach him with his prior refusal to answer some twenty-seven questions before the grand jury which indicted him. The series of questions involved went to the heart of the charges on which petitioner was later indicted, tried and found guilty. The questions inquired of petitioner whether he had received monies from John Schmidt; whether these monies were loans and whether he had requested John Schmidt to destroy his records of dealings with petitioner (R. 164-175). To each question petitioner had answered to Mr. Goldsehein, the special prosecutor, that he felt he was not before the grand jury as an ordinary witness, but as a prospective defendant (R. 164-175); he also stated that he was informed that he was under investigation for income tax evasion and therefore, he refused to answer because his answers might tend to incriminate him (R. 172).

Petitioner's motions for judgments of acquittal were filed in both cases at the close of the government's case and at the close of the entire case (R. 125-127, 183-186); all motions for judgment of acquittal were overruled (R. 125-127, 183-186). The basis for petitioner's motions for judgment of acquittal in the tax evasion case was that the allegedly unreported funds were under the government's own evidence embezzled funds and, therefore, not properly reportable by petitioner (R. 125-127, 183-186). Petitioner's Requested Instructions No. 3 and No. 4, spelling out this same theory of defense, were refused by the trial

court and duly excepted to by petitioner (R. 213, 214). The trial court also refused to give petitioner's Requested Instruction No. 13 which would have told the jury that the fact that petitioner had invoked his constitutional privilege against self-incrimination constituted no evidence whatsoever of petitioner's guilt and was not to be considered by them in that regard (R. 217). Petitioner excepted to such refusal by the trial court on the ground that it violated and nullified his constitutional privilege against self-incrimination (R. 217). Furthermore, the trial court refused to give petitioner's Requested Instruction No. 12 that the jury might find him guilty of a lesser offense—specifically a misdemeanor under Section 3616 (a) of the Internal Revenue Code (R. 214-217). This refusal was excepted to on the ground that such instruction was mandatory under Rule 31 of the Federal Rules of Criminal Procedure (R. 214, 215).

On April 22, 1955, the United States Court of Appeals for the Eighth Circuit issued its order affirming the judgments and sentences on all counts of the tax evasion case and on the second count of the obstruction of justice case; it vacated the judgment and sentence on the first count of the obstruction of justice case (Appendix, infra, pp. 44-45), for reasons not germane to this Court's review.

The court below affirmed the conviction on the ground that the case of **Commissioner v. Wilcox**, 327 U. S. 404, as limited to its facts in **Rutkin v. United States**, 343 U. S. 130, did not apply because the monies received by petitioner came from Schmidt, not from his employer the Labor Health Institute. The funds in this case, the court said, went first to Schmidt; therefore, this could not be the crime of embezzlement because none of the funds came into petitioner's possession lawfully or in the course of his employment. The court relied on its earlier case of **Marienfeld v. United States**, 214 F. 2d 632, cert. den. 348

U. S. 865, to the effect that petitioner had sufficient economic control as readily to realize economic value from it. In connection with the petitioner's contention that the government had put his character in issue on its case-in-chief when the government witness Schmidt referred to a prior arrest of petitioner not connected with the instant charges, the court distinguished the almost identical case of **United States v. James**, 2 Cir., 208 F. 2d 124, where it was held prejudicial error for a narcotics agent to have referred in the prosecution's case to a prior arrest of a defendant not connected with the instant trial. The distinction was rested on the ground that in the **James** case the testimony came from the lips of a government narcotics officer who, it may be assumed, was more familiar with courtroom rules of evidence than was the witness Schmidt in the instant case. However, the court below considered it advisable to admit this distinction to be a "thin one" and to state that to the extent the holding in the **James** case may be inconsistent with its decision in the instant case, it was refusing to apply the Second Circuit case (Appendix, infra, p. 37):

> ". . . Admittedly, this distinction is a thin one, and to the extent that the **James** case may be inconsistent with our decision herein, we do not apply it."

The court held, in regard to petitioner's impeachment with his prior refusals to answer before the grand jury, that the trial court was justified in permitting such impeachment and in refusing to give petitioner's requested cautionary instruction in connection therewith. The court could discern nothing unjust or unfair in a rule permitting such impeachment of a defendant who elects to take the stand in his own behalf because he thereby waives his privilege of immunity and becomes subject to cross-examination and impeachment the same as any other witness. It concluded with respect to petitioner's contention that the terms of his probation were unreasonable in that

they even denied him the right to be employed by a labor organization in any capacity that the terms of probation are discretionary with the sentencing court. It concluded that it was not an abuse of discretion for the trial court to be of the opinion that the petitioner's rehabilitation would proceed more effectively if he were entirely dissociated from all union or union-connected activity during the period of probation. Finally, the court decided the trial court's refusal to give a lesser offense instruction under 3616 (a), 26 U. S. C. A., was correct under its earlier opinion in **Dillon v. United States**, 8 Cir., 218 F. 2d 97, in which case this Court granted a writ of certiorari on April 25, 1955, because of the importance of the question presented; see **Dillon v. United States**, No. 629, this Term.

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below in the instant case and that of the Second Circuit in **United States v. James**, 2 Cir. 208 F. 2d 124 (wherein the question of the admission of a defendant's prior arrest on the government's case-in-chief was considered) are in conflict; this conflict was conceded in the court below (Appendix, infra, p. 37).

In the **James** case the United States Court of Appeals for the Second Circuit ruled on a situation almost identical to the instant case and ordered a conviction reversed. In that case the admission of such evidence was permitted by the trial court when a government narcotics officer referred to a prior arrest of the defendant unconnected with the instant charge; the Second Circuit reversed because of a dominant policy which recognizes that which tends to show a likelihood that the accused had flouted the law at some other time is too apt to be given undue weight by the jury and to prejudice his right to a fair trial. Because the evidence of the prior arrest, as in the instant case, did

not come within any applicable exception to the general rule of exclusion (it was colorless as to identity, intent, or previously conceived design), the Second Circuit concluded that the effect of the introduction of this testimony was too clearly to show a proclivity to commit crime and blacken the character of the defendant who, like petitioner here, at no time put his character in issue. In the instant case, no exception to the general rule of exclusion is similarly applicable to permit the admission into evidence of the witness Schmidt's reference to petitioner's prior arrest. The reference is equally as colorless as that in the **James** case. The court below, however, suggests a distinction between the cases, which it admits to be a "thin one" (Appendix, infra, p. 37), in that the narcotics agent in the **James** case may be assumed to have been more familiar with the courtroom rules of evidence than the witness Schmidt in the instant case. Recognizing the thinness of its distinction, the court below concludes (Appendix, infra, p. 37):

> ". . . Admittedly, this distinction is a thin one, and to the extent that the holding in the **James** case may be inconsistent with our decision herein, we do not apply it."

Furthermore, the decision of the court below, it is submitted, is erroneous and the decision of the United States Court of Appeals for the Second Circuit in **United States v. James**, supra, is correct. Morever, the decision of the court below conflicts with the decision of this Court in **Michelson v. United States**, 335 U. S. 469, wherein this court treated the problem, l. c. 475, 476:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presump-

tion of good character, Greer v. United States, 245 U. S. 559, 62 L. Ed. 469, 38 S. Ct. 209, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

It is clear from the **Michelson** case, and as properly interpreted by the Second Circuit in the **James** case, that the policy of excluding such evidence is to prevent its being given undue weight by the jury to the prejudice of a defendant. Accepting this premise, petitioner contends that the jury's prejudice is neither mitigated nor lessened because it hears the prejudicial testimony from the lips of a painter, Schmidt, rather than from the lips of a government agent. The distinction suggested by the court below that the error is cognizable or not depending on the assumed familiarity of the witness with courtroom rules of evidence flies in the face of this Court's "overriding policy" expressed in the **Michelson** case; it completely begs the question of the prejudicial effect of the testimony on the twelve persons sitting in the jury box and reduces the question of prejudicial error to assumptions concerning a witness' earlier exposure to the rules of evidence. Is a jury less "overpersuaded" by the proof of a defendant's bad

character when it comes from a painter rather than a government agent? Where in the scale of occupations ranging from painter to narcotics agent does the assumed familiarity with the courtroom rules of evidence become sufficient that such testimony is prejudicial to a defendant? It is suggested that the "thin" distinction offered by the court below completely overlooks that the policy of the rule is to assure the defendant a fair trial; it is not to penalize the witness or prosecutor for unfair play—so that an evaluation of the witness as to motive or knowledge of the inadmissibility of his testimony shifts the emphasis from the basic inquiry.

The opposing opinion of the Second Circuit in the **James** case places no such qualitative restriction on the source of the inadmissible testimony referring to a defendant's previous bad character, nor is any implied or warranted by this Court's opinion in the **Michelson** case. In the last analysis the inconsistency admitted to exist by the court below between its opinion and the **James** opinion of the Second Circuit is one to be settled by this Court. The question of the admissibility of character evidence by the prosecution before the defendant has put his character in issue is important in the administration of justice; whether through malice, inadvertence, or prompting, the problem is likely to present itself every day in our federal criminal trials. This Court should consider such an important problem; if the door to the admissibility of such evidence by the prosecution is to be opened in some circuits and not in others, then confidence in the uniformity of the administration of criminal justice is lost. The resolution of this conflict, therefore, is plainly in the public interest.

2. The question is of importance and in the public interest whether in a prosecution under a felony indictment for tax evasion under Section 145 (b) of the 1939 Internal Revenue Code, the trial court is required by Rule 31 of

the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under Section 3616 (a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether the defendant committed the greater or lesser offense. The reasons for granting the writ on this issue have been well stated in the petition for certiorari filed in **Dillon v. United States**, No. 629, this Term, wherein this identical question was presented to this Court. On April 25, 1955, this Court granted petitioner Dillon's writ of certiorari and will review the question, similarly preserved in the instant case (Appendix, infra, p. 42). It is submitted that this Court has already accorded cognizance to the importance of this question, now twice decided by the United States Court of Appeals for the Eighth Circuit, and that petitioner's writ should be granted that he may present his arguments in support of the proposition and come within this Court's ruling of the issue.

3. The opinion of the court below is erroneous and conflicts with this Court's decision in **Commissioner v. Wilcox**, 307 U. S. 404, holding embezzled funds not to be taxable income. This question is an important one because it affects not only the proper administration of the revenue laws but also the administration of criminal justice, both on the federal and state levels. The basic problem goes back to the 5-4 decision of this Court in the case of **Rutkin v. United States**, 343 U. S. 130, holding extorted funds to be taxable income. The effect of the **Rutkin** case on the **Wilcox** doctrine has been subject to much debate and controversy by the various Courts of Appeal and various writers in legal periodicals.

To this apparent conflict between **Wilcox** and **Rutkin**, there has been added a policy of studied indifference to the **Wilcox** rule by the Courts of Appeal with whom the **Wilcox** doctrine has not been popular; the language of

the **Rutkin** case limiting **Wilcox** to its facts has furnished sufficient grounds for distinguishing that case and refusing to apply it to any given fact situation so that in no circuit since the **Rutkin** opinion has the **Wilcox** rule ever been held applicable. In **Kann v. C. I. R.**, 3 Cir., 210 F. 2d 247, cert. den., 347 U. S. 967, the asserted bases for distinction of the **Wilcox** case offered by the majority opinion were such that Judge Kalodner, writing for the dissent, characterized them as "distinctions without a difference". Of the Tax Court in the same case, he said, that it disclosed an amazing dexterity in judicial legerdemain in distinguishing **Wilcox.** In **United States v. Bruswitz**, 2 Cir., 219 F. 2d 59, in rejecting a taxpayer's argument that commercial bribes closely resembled embezzled funds, the Second Circuit found it difficult to perceive what, if anything, is left of the **Wilcox** holding after **Rutkin.** In the Eighth Circuit the problem was first presented to the Court of Appeals in **Rollinger v. United States**, 8 Cir., 208 F. 2d 109, where **Wilcox** was found not to apply because the property had not been fraudulently appropriated by the person (i. e. taxpayer) to whom it had been entrusted in the first instance. The court thought that because the wrongdoer had wrongfully acquired the property in the first instance by means of a false pretense that the taxpayer was guilty of obtaining property by false pretenses. The **Rollinger** case was the authority for the Fourth Circuit's later distinction of the **Wilcox** case in **Briggs v. United States**, 4 Cir., 214 F. 2d 699, cert. den., 348 U. S. 864. Subsequently, in **Marienfeld v. United States**, 8 Cir., 214 F. 2d 632, cert. den., 348 U. S. 865, a taxpayer convicted of evasion pleaded the defense of embezzlement. After some misgivings the majority reconciled the **Wilcox** and the **Rutkin** cases on the basis of the wrongdoer's deferred obligation to account for the funds received. The Eighth Circuit did not deny that the misappropriation by Marienfeld was embezzlement, but found the **Wilcox** case distinguishable. Its reasoning was

that Wilcox had been at all times under an immediate and instantaneous legal obligation to pay over the money collected for his employer, while Marienfeld's obligation to pay over the money which he misappropriated did not arise until a report of the proceeds was made and a statement rendered to the company for which he acted. In effect, the majority further refined the **Wilcox** doctrine by subdividing embezzlement into types so that only in that type where there existed a kind of pre-embezzlement obligation to account on the part of the embezzler would **Wilcox** apply and in those types, as **Marienfeld**, where the obligation to account arose post-embezzlement, **Wilcox** would not apply. It was on the basis of such reasoning that the **Wilcox** case was successfully distinguished; however, one judge, with candor, wrote a special concurring opinion in which he rejected such reasoning, but went on to make clear that he would not apply **Wilcox** under any circumstances. It was his thesis that the ill-gotten proceeds of embezzlers, robbers, burglars, larcenists, and of all criminals, were taxable income. See Judge Johnsen's concurrence, 214 F. 2d 639-640. The inescapable conclusion left by these cases is that the Courts of Appeal believe little in the efficacy of the **Wilcox** case; yet this is a problem on which certiorari was first granted to settle a conflict between the circuits on a question of importance. It would appear that the conflict is now between the Courts of Appeal and this Court. If **Commissioner v. Wilcox**, supra, has "earned its just repose", it should be for this court to lay it to rest. If the proceeds of all common-law crimes against property shall be considered henceforth as taxable income, as suggested by Judge Johnsen, then counsel representing persons accused of such crimes in the various state courts should be sufficiently advised of the risk of federal tax prosecution that they may intelligently counsel such persons who may be entertaining the thought of a guilty plea. In any event, the heaping of refinement upon refinement and dis-

tinction upon distinction by courts struggling to escape the impact of the **Wilcox** case, as in the instant case, does no credit to our search for some basis of precedent and certainty which is characteristic of a common-law jurisprudence.

The error born of a court's aversion to the **Wilcox** doctrine is nowhere better demonstrated than in the instant case. Here the government's proof—uncontradicted and bolstered by petitioner's—was that petitioner was at all times in control of his employer's bank account and the monies which he allegedly misappropriated in his capacity as business manager. With respect to the $2,500-$3,000 painting done by Schmidt at petitioner's home and paid for out of Labor Health Institute funds, it is clear that petitioner used his employer's money to satisfy a purely personal obligation. The same is true of the $1,500 worth of concrete and carpentry work done at petitioner's home by J. Shulman and Sons Contracting Co. In both cases, he paid the money to the contractor and received none of it back. The remainder of the allegedly unreported income he received by paying out his employer's money to Schmidt for painting work which petitioner knew had not been done and then receiving back this overpayment from Schmidt. The answer of the court below is that these instances of misconduct do not constitute embezzlement because the petitioner received the money from Schmidt, not from his employer Labor Health Institute. The court adopts the trial court's reasoning that the funds had never been received by petitioner in the course of his employment and thereafter converted to his own use. The court breaks down petitioner's misconduct into steps: first, the funds went to Schmidt, who obtained them by fraud and deceit; secondly, Schmidt gave them to petitioner so that when petitioner obtained possession from Schmidt, he did not do so as a matter of trust from his employer or in the course of his employment. It is submitted that the court's

reasoning overlooks the initial possession of the funds misappropriated by petitioner when his employer entrusted him with the possession and control of its deposited funds by permitting him to draw and sign checks on its account. **This is the possession entrusted to petitioner by virtue of his employment as surely as the actual physical possession of the bookkeeper in the Wilcox case.** The requisite control or possession for embezzlement of an employee entrusted with his employer's funds has never been restricted to manual and physical control or possession, the right to draw on them (or constructive control and possession) being sufficient. **State v. Johnson,** 109 Kan. 234, 199 P. 104; **State v. Larson,** 123 Wash. 21, 211 P. 885; **Reeves v. State,** 95 Ala. 31, 11 So. 158; **People v. Gorman,** 94 Cal. App. 397, 271 P. 361; **United States v. Royer,** 122 Fed. 844; **Richberger v. State,** 90 Miss. 806, 44 So. 772.

Because of the fact that the pertinent claims for labor rendered to the Labor Health Institute by Schmidt and Shulman were false, petitioner submits that the court below erroneously concluded the situation to be one of obtaining money under false pretenses. This overlooks the basic realism that embezzlers generally seek to cover their tracks by making false representations to their employers. Because the false representation is made as here by an accomplice on the employee's behalf does not dictate a different result. As noted by the Eighth Circuit Court of Appeals in the **Rollinger** case, supra, the major distinction between the crimes of embezzlement and false pretenses is not found in the presence or absence of a false representation to the victim, but in the initial entrusting of possession or control to the wrongdoer in the one as contrasted with its total absence in the other. Furthermore, in false pretenses the victim intends to pass title to the wrongdoer, while in embezzlement there is no such intent. **Akers v. Scofield,** 5 Cir., 167 F. 2d 718. The following

hypothetical situations (in each of which the wrongdoer had no claim of right), it is submitted, illustrate such basic principles and demonstrate where the court below erred in failing to apply them to the instant embezzlement:

(1) B is an employee of L Corporation. There is physically turned over to him in the normal course of his duties $2,000.00 in cash to pay legitimate bills presented by the corporation's supplier's. B takes $500.00 of this amount and deposits it in his bank account and uses the money to pay for repairs on his home. What crime has been committed? B is guilty of embezzlement; he was entrusted with the possession of his employer's funds and converted them to his own use. There was no intent to pass title to the $500.00 by L Corporation or any such intent which could be ascribed to L Corporation. The obligation of B to repay the $500.00 was immediate and unqualified upon his unauthorized taking and the $500.00 is not income to B, **Commissioner v. Wilcox**, supra.

(2) Same facts as in 1, except that B, instead of just taking the money, seeks to cover his tracks by submitting to his employer, L Corporation, a fake bill allegedly rendered to him by the S supplier and allegedly paid in cash by B. S has no knowledge of the transaction. What crime? Same result; the crime is embezzlement. Despite the false representation by B to his employer L Corporation (i. e., that he paid a bona fide bill on his employer's behalf to S) he has converted money lawfully and originally entrusted to his (B's) possession. L Co. had no intent to pass any title. The obligation of B to repay the $500.00 was immediate and unqualified upon his unauthorized taking—no income to B.

(3) Same facts as in 2, except that S is a confederate of B's and at B's insistence renders on one of his invoices a billing for services never, in fact, rendered to L Co. B pays the bill to S with $500.00 of the money entrusted

to him by his employer L Co., well knowing that it is false. S, on receipt of the money, hands over same to B who uses it to pay for repairs on his home. What crime? The crime is still embezzlement; the fact of the false representation does not change the nature of the crime. B still had the initial lawful requisite possession of the funds which were converted to his own use. No title to the $500.00 passed from L Co. to S or to B because L Co. had no intent to pass title. Whatever may have been B's intent in this matter is immaterial and cannot be ascribed to L Co. under settled principles of respondeat superior because B was acting inimical to the interest of his employer, contrary to express directions, and outside the scope of his authority. The obligation of B to repay the $500.00 was immediate and unqualified upon his illegal taking; in this case B's unlawful taking is represented by the unauthorized payment to S who serves as a convenient depository for the moneys misappropriated from L Co.— no income to B.

(4) Same facts as in 3, except that, instead of being physically furnished with $2,000.00 in cash, B is given a key to L Co.'s strong box containing $2,000.00 in cash for the payment of L Co.'s legitimate bills. B goes to the strong box, opens it with the key, and pays S's false bill in the manner set forth in Example 3 above. What crime has B committed? The crime is still embezzlement; B had the constructive possession (i. e., control and access to) of his employer's funds so entrusted to him. He need not have them in his physical and manual possession. For the reasons stated in Example 3 above, the L Co. could have had no intent to pass title and B's obligation to repay the $500.00 was immediate and unqualified—no income to B.

(5) Same facts as in 4, except that, instead of being given access to L Co.'s strong box, containing cash in

the amount of $2,000.00 by having been furnished with a key, B is given the authority to sign checks and draw on L Co.'s account at the Y Bank for the payment of L Co.'s legitimate bills. Of what crime is B now guilty? The crime is embezzlement; B, by his control and access to his employer's bank account, had constructive and lawful possession of his employer's monies; he converted $500.00 of that amount to his own use. L Co. had no intent to pass title to S. B was under an immediate and unqualified obligation to return the money so converted. Embezzlement convictions have been uniformly upheld where the employee had control and access to his employer's funds on deposit with a bank and not in the employee's actual physical possession, **State v. Larson,** supra; **State v. Johnson,** supra; **Reeves v. State,** supra; **People v. Gorman,** supra; **United States v. Royer,** supra. No income to B.

(6) Same facts as in 5, except that, although B is given the authority to sign checks and draw on L Co.'s bank account in the Y Bank, employee C countersigns the checks. What crime? Same result—embezzlement. A countersignature merely attests the authenticity of B's signature. **Union Marine and General Ins. Co. v. Holmes,** 249 Ala. 294, 31 So. 2d 303; **Ulledaleh v. U. S. Fire Ins. Co.,** 74 N. D. 589, 23 N. W. 2d 856; **Gustafson v. Taber,** 125 Mont. 225, 234 P. 2d 471. B still has constructive and lawful possession of his employer's bank account. He misappropriated the money from the possession so entrusted when he drew an unauthorized check to S. When the accomplice S physically hands over the misappropriated funds to B, this does not change the nature of the crime from embezzlement. It would be just as fallacious to say that B did not have possession entrusted to him because the last physical step was the transfer of the money from S to B as it would be to say that there was no possession for embezzlement in the bookkeeper Wilcox because he

received the money physically from persons other than his employer. This is where the court below erred. L Co. had not the requisite intent to pass title for false pretenses because B's intent could not be ascribed to it; B was acting inimical to the interests of his employer and had departed from the scope of his authority. This Example 6 is the phase of the instant case represented by the payments from Schmidt to petitioner and represents no income to petitioner.

(7) Same facts as in 6, except that S is not an accomplice of L. The false claim is presented to B by S and paid by B without knowledge of its falsity. What crime? Like all the prior examples, the funds are lawfully and initially entrusted to B's constructive possession. What considerations would lead to a different result? First, absent B's connivance, the property is acquired in the first instance by S, the wrongdoer, as the result of a false pretense; this is unlike the prior examples where B, the wrongdoer, had initial possession and then unlawfully converted a part of the funds lawfully in his possession. The consideration to be resolved in distinguishing between embezzlement and false pretenses is when the wrongdoer first acquired possession. If he had possession, then transmitted same to a third party who returned the money to him, the crime is still embezzlement. (It is submitted that it would be overlooking realities, as the court below did in the instant case, to say that Berra acquired possession from Schmidt, when Berra had constructive possession from the Labor Health Institute's first receipt of the money and deposit to its account. Thus, in the instant Example No. 7, it is seen that there is no fraudulent appropriation by the person B to whom it had been entrusted, but a wrongful acquisition by the wrongdoer S in the first instance as a result of a false pretense.) Also, it is submitted that Example 7 presents a clear case of obtaining

property by false pretenses because there is present the requisite intent by L Co. to pass title to S. Because B is unaware of the fraud practiced upon his employer, he is not acting outside his authority and his intent to pass title is properly ascribable to L Co. In this case S is under no immediate obligation to repay; he has acquired a voidable title and enjoys the use of the money until L Co. seeks to void the transaction, thereby enjoying income under the rule of the **Rutkin** case, supra.

(8) B is an employee of L Co.; he signs checks and has control of L Co.'s bank account for the purpose of paying the legitimate bills of L Co. to various contractors who are remodeling L Co.'s place of business. B prevails upon contractor S to do $2,500.00 worth of painting at his (B's) home and upon contractor S-1 to complete $1,500.00 worth of concrete and carpentry work; he advises S and S-1 to bill L Co. for this work. B approves said bills, draws checks on L Co. in payment, and secures the proper countersignature, and pays S and S-1 for the work done. What crime? This is the Shulman phase of the instant case (i. e., the $1,500.00) and the $2,500.00 painting work allegedly done by Schmidt for Berra. For the foregoing reasons (B's control and access to L Co.'s bank account and L Co.'s lack of intent to pass title), it is submitted that Example 8 presents a clear case of embezzlement and no income to B.

Under the foregoing situations, the common law principles of crimes amply demonstrate the correctness of petitioner's contention that the monies allegedly unreported as income were embezzled funds. A necessary corallary to such a conclusion is that petitioner acquired void title to said funds under the Government's own evidence and was at all times under an immediate and unqualified obligation to return same to the Labor Health Institute; such illegally acquired property is not income under this Court's holding in the **Wilcox** case, supra.

4. This case raises important questions concerning the Fifth Amendment and particularly the privilege against self-incrimination. Whether a prospective defendant can be brought before a grand jury with knowledge that he is being investigated for tax evasion and be subsequently impeached by his refusal to answer incriminating questions before that body is a question with far-reaching implications in the administration of criminal justice. Whether, assuming such impeachment is proper, a trial court upon request must give a cautionary instruction (telling the jury that defendant's invocation of his privilege against self-incrimination constituted no evidence whatsoever of his guilt and was not to be considered by them in that regard) is equally far-reaching.

The question involves the spirit and breadth to be accorded the privilege against self-incrimination. Traditionally, the reason for the privilege is one of fairness. If the ruling of the court below permitting such impeachment is upheld, then is it not possible for the prosecutor, who has a bare prima facie case and is unsure of the ability of his evidence to dispel a jury's reasonable doubt, to haul the defendant before the grand jury and force him either to testify without the presence of counsel or to refuse to testify and thus lay himself open to devastating impeachment at the trial? What is there to prevent the prosecutor from calling the defendant before the grand jury even after indictment so that the defendant has the choice either of testifying then without counsel (despite his constitutional guarantee of counsel at every stage of the proceedings) or of impeaching any credibility to be accorded his later testimony in his own defense? It is no answer to say that (whether before or after indictment) the accused can avoid either horn of the dilemma by refusing to testify before the grand jury and by staying off the witness stand at his trial. Such an answer means that the Fifth Amendment can be turned into an

offensive weapon by the prosecution to checkmate the defendant. It opens the way for the prosecution to set the stage for comment—and proper comment under the decided cases—that the prosecution's evidence stands undenied and uncontradicted, **Baker v. United States**, 8 Cir., 115 F. 2d 533. It is difficult to believe that the framers of the Fifth Amendment intended such a result.

Furthermore, petitioner's request for an instruction placing the permitted impeachment in its proper perspective, it is submitted, should have been granted; if the impeachment is proper as held in **Viereck v. United States**, App. D. C., 139 F. 2d 847, then the impeachment should have been so restricted and presented to a jury of laymen that they would not place undue emphasis on the proper invocation by a defendant of his constitutional privilege to some twenty-seven different incriminatory questions. Today, with the press full of catchwords as "Fifth Amendment Communists," "Fifth Amendment Teachers," etc., the refusal to answer under the protection of that Amendment is popularly regarded as a confession of guilt. As best he can, a trial judge, having permitted such impeachment, should give to the jury, as with the rest of his charge, the legal perspective on such refusal to answer. It no doubt will not be the only instance wherein the trial court's charge will differ from the layman's notions of justice and guilt. Such an instruction, as requested here, is amply supported by the language of Mr. Justice McKenna in **Burdick v. United States**, 236 U. S. 79, l. c. 94:

> "If it be objected that the sensitiveness of Burdick was extreme because his refusal to answer was itself an implication of crime, we answer, **not necessarily in fact, not at all in theory of law.** It supposed only a possibility of a charge of crime and interposed protection against the charge and, reaching beyond it,

against furnishing what might be urged or used as evidence to support it." (Emphasis added.)

The questions presented here have never been directly ruled by this Court. In view of the dynamic character of the Fifth Amendment, the broader use of the inquisitorial process and this Court's own changed concept of the Fifth Amendment (see **Mason v. United States**, 244 U. S. 362, as compared with **United States v. Hoffman**, 341 U. S. 479), it is submitted that the rulings of the Courts of Appeal on this question should be re-examined and the law uniformly declared.

5. The terms of petitioner's probation on his conviction for obstruction of justice prevent him from holding any office in or employment by any organization of labor or any labor affiliate. This form of sentence and probation has become commonplace in the Eighth Circuit and Seventh Circuit for persons convicted of labor racketeering, see **Callanan v. United States**, 8 Cir. (now on appeal), **Dale v. United States**, 7 Cir. (now on appeal). This is the first time that it has been applied to a labor leader convicted of endeavoring to obstruct justice. It is suggested that whatever may be said of the reasonableness of the relationship between labor racketeering and continued employment by a labor union, no such relationship is present between the crime of obstructing justice and employment in the field of labor. There is nothing inherently conducive to the crime or any special temptation presented to employees of labor unions more than persons in other occupations. The terms of probation must reasonably relate to the offense charged. The restrictions imposed here are arbitrary and unfounded prohibitions which actually amount to additional punishment, having no reasonable relationship to the petitioner's rehabilitation.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari in the above consolidated causes should be granted.

Respectfully submitted,

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OPINION.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,214.

Louis Berra, Appellant, vs. United States of America, Appellee. — Appeal from the United States District Court for the Eastern District of Missouri.

No. 15,215.

Louis Berra, Appellant, vs. United States of America, Appellee. — Appeal from the United States District Court for the Eastern District of Missouri.

[April 22, 1955.]

Stanley M. Rosenblum (Mark M. Hennelly was with him on the brief), for appellant.

Charles H. Rehm, Assistant United States Attorney, and William K. Stanard, II, Assistant United States Attorney (Harry Richards, United States Attorney, was with them on the brief), for appellee.

Before Gardner, Chief Judge, and Woodrough and Thomas, Circuit Judges.

Woodrough, Circuit Judge.

Appellant was convicted in No. 15,214, on both counts of a two-count indictment charging him with corruptly endeavoring to influence a witness before a grand jury and obstruct, influence and impede the due administration of justice, in violation of Title 18, U. S. C. A., section 1503. He was also convicted in No. 15,215 on all counts of an indictment charging income tax evasion for the years 1951, 1952 and 1953, in violation of Title 26, U. S. C. A., section 145 (b). The two cases were consolidated for the jury trial, a verdict of guilty resulting in both cases. Appellant was sentenced to four years imprisonment on each of the three counts in No. 15,215, the sentence on all counts to run concurrently. In No. 15,214 the court suspended imposition of sentence and placed appellant on probation for five years, said probation to begin and run consecutively with the term of imprisonment imposed in No. 15,215, and with the special condition that appellant shall not, during the period of probation, hold any office in a labor union or labor organization. The motion for judgment of acquittal or in the alternative for a new trial having been overruled, appellant brought this appeal.

The first point urged by appellant is that the trial court erred in overruling his motion for judgment of acquittal on the income tax evasion counts in No. 15,215 for the reason that the monies allegedly constituting income to appellant were, under the government's own proof, funds embezzled from his employer and therefore did not constitute taxable income to him. Appellant also assigns as error the trial court's failure to give his requested instructions to that effect.

The evidence on the trial below, which was not in dispute except as noted hereinafter, showed that during the years 1951, 1952 and 1953, appellant was the business

manager[1] of the St. Louis Labor Health Institute, a non-profit organization furnishing free medical aid to members of Teamsters' Local 688, A. F. of L., and their families. The Labor Health Institute is operated on funds collected from employers who maintain collective bargaining agreements with Local 688. Appellant was authorized, as business manager of the Labor Health Institute, to approve payment of bills incurred by the organization and to draw and sign checks therefor. The checks were required to be countersigned by another employee. In 1949 the Labor Health Institute contracted with J. Shulman and Sons Constracting Company for extensive alteration work on its premises in St. Louis. The general contractor subcontracted the painting work to one John Schmidt. In 1950, after the original painting contract was completed, Schmidt was called back by the Labor Health Institute for further work. It was at this time, Schmidt testified, that appellant approached him with a plan whereby he, Schmidt, would submit padded bills to the Labor Health Institute by overstating his amount of labor performed, appellant would approve the bills and issue payment to Schmidt, and then Schmidt would return the amount of overpayment to appellant. Schmidt testified, and the government introduced some of his checks in substantiation, that he paid over to appellant some $5,000 under this arrangement during the three years covered by the indictment. He testified that he deducted these payments as commissions in computing his own income tax returns. During these same three years he testified that he did approximately $2,500 to $3,000 worth of painting at appellant's home which he charged to and received payment for from the Labor Health Institute. The evidence also showed that in 1951 a subcontractor purchased materials for and performed labor at appel-

[1] Although appellant was officially business manager only until September, 1952, he performed the same duties for the remainder of 1952 and during 1953.

lant's home for which he was paid some $1,500 by J. Shulman and Sons Contracting Company, who in turn billed and received payment of that amount from the Labor Health Institute. These amounts constituted the alleged unreported income received by appellant during the three years in question.

Appellant took the stand in his own behalf and did not deny receiving the money Schmidt claimed to have paid him. He insisted, however, that these payments were loans and that he had later partially repaid Schmidt. He further testified that he had never requested Schmidt to submit padded labor bills to the Labor Health Institute or that there had ever been any such arrangement between the two. With respect to the $1,500 collected by J. Shulman and Sons Contracting Company from the Labor Health Institute for material furnished and labor performed at appellant's home, he testified that he never requested Labor Health Institute be billed for that, and had no knowledge of the fact that it was so billed. Al Shulman testified that the erroneous billing was the fault of his company, not appellant, and that as a result of the grand jury investigation appellant paid him for the work and materials and he repaid the Labor Health Institute.

Appellant does not here contend that the jury was not warranted, under the evidence presented, in finding that the monies paid over to him by Schmidt were not loans. His position, as previously stated, is that all of the unreported funds received during the years in question were embezzled from his employer, Labor Health Institute, and therefore, under the decision of the Supreme Court in **Commissioner v. Wilcox**, 327 U. S. 404, did not constitute taxable income to him.

The Supreme Court, however, in its later decision in **Rutkin v. United States**, 343 U. S. 130, expressly limited its holding in the **Wilcox** case to the facts there existing. And we do not think the facts in the present case bring it

within the scope of the Wilcox decision. The prosecution proved, and the appellant admitted, that the monies he received came, not from his employer, Labor Health Institute, but from Schmidt. That this was not a case of embezzlement was recognized by the trial court when, in ruling on appellant's motion for bail, it said:

"Under neither the Government's theory nor that of the defendant can the receipt of the funds by defendant be embezzlement. Genrally speaking, embezzlement is the receipt by an agent, such as defendant, of money of his principal, and conversion of the funds to his own use. The funds must be received in the course of the employment or defendant be rightfully in possession of them and thereafter convert them to his own use. Admittedly, the funds in this case went first to Schmidt. He manifestly obtained them by fraud and deceit. He never was lawfully entitled to them. Schmidt in some instances put the funds in his bank account. None of the funds came into defendant's possession lawfully or in the course of his employment. Defendant may be guilty of obtaining money of the welfare organization by a fraudulent scheme or device, but he could not be convicted of embezzlement."

We agree.

From the record as a whole we are convinced that the monies received by appellant from Schmidt constituted taxable income under the test laid down in the **Rutkin** case, supra, and followed by this court in **Marienfeld v. United States**, 8 Cir., 214 F. 2d 632: "An unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it." That appellant had such control over the funds received from Schmidt cannot be doubted on this record. The trial court was not in error, therefore, in overruling appellant's motion for judgment of acquittal or in refusing to give his

requested instructions pertaining to the embezzlement theory.

It is next argued that the trial court committed prejudicial error in unduly restricting cross-examination of Schmidt, the principal witness for the government. On direct examination Schmidt testified that at appellant's insistence he had destroyed his check stubs, cancelled checks, and daily work sheets reflecting his payments to appellant, but did not destroy his cancelled checks of 1952 and 1953 reflecting such payments. The government introduced in evidence the working papers of Schmidt's 1951 income tax return to prove his claimed pay-offs to appellant in that year. On cross-examination appellant sought to discredit the witness by introducing in evidence a check of the Labor Health Institute in the amount of $1160.60, dated February 9, 1951, and made payable to Schmidt, which did not appear on his 1951 income tax working papers. Appellant also introduced, without objection, a photostatic copy of Schmidt's 1951 income tax return which also apparently did not include the $1160.60 check. When appellant attempted to cross-examine Schmidt on the correctness of his 1952 and 1953 income tax returns, however, the trial court sustained the government's objection that the matter was irrelevant and collateral to the issues being tried. Appellant offered to prove that Schmidt had omitted certain items of income in his 1952 and 1953 tax returns and that by reason thereof the witness was biased, prejudiced, and interested; that he was under income tax investigation; and that the destruction of his records inured to his own benefit.

The scope of cross-examination is within the judicial discretion of the trial court. **Myres v. U. S.**, 8 Cir., 174 F. 2d 329; **Holmes v. U. S.**, 8 Cir., 134 F. 2d 125; **Hewitt v. U. S.**, 8 Cir., 110 F. 2d 1. We are not prepared to say the trial court abused its discretion in this case. Schmidt had testified on direct examination that he was not under in-

vestigation for income tax evasion and that no promises had been made to him in respect thereto. This was fully explored on cross-examination. Schmidt had also testified that the payments made to appellant were credited as commissions on his tax returns and his 1951 income tax working papers showed that they had been so credited. In sustaining the objection to questioning concerning the correctness of Schmidt's 1952 and 1953 income tax returns, the court ruled:

"You may go into the subject as to whether or not he included in his return these payments which he claimed he put on to the bills of the Labor Health Institute and gave the money to the defendant. Now, he said in his direct examination that he showed on his income tax return, he showed a credit, paying them to the defendant. That is the extent of your inquiry."

To have permitted further questioning as to other items of Schmidt's income tax returns would have the tendency of confusing the issue before the jury. The appellant, not witness Schmidt, was on trial charged with evading taxes and appellant's income tax returns were the only ones pertinent to the issue. Further, inquiry along this line would have served to unreasonably prolong the trial, another proper consideration before the court in making its ruling. We hold that no abuse of discretion has been shown on the part of the trial court in limiting cross-examination of the witness Schmidt.

Appellant also complains that the prosecution was permitted to put appellant's character in issue in its case in chief. An excerpt from the record is set out to show how this alleged error occurred:

"Q. (Witness Schmidt was asked when appellant requested him to destroy his records.)

"A. Well, he was constantly after me to ask me why I kept that daily work sheet, and I told him I kept that for

my records. He constantly told me to get rid of them or, oh, I remember very closely after Mr. Berra was arrested, why he called me up, and that was on George Washington's birthday, the 22nd of February.

"Q. Now, will you tell the jury what the conversation was with Mr. Berra on George Washington's Birthday?

"A. He called me up and asked me——

(At this point the court called a recess.)

After recess.

"The Court: This witness was asked to describe a conversation on the 22nd of February, is that correct?

"A. That is right.

* * * * * * * *

"The Court: Just a moment. I understood you to say it was after the defendant had been arrested. Did you say that?

"A. No. No. I did say it, but that is not correct.

"The Court: You better clear that up before you get through your case, because that doesn't correspond with the indictment. It is very material.

"Q. Mr. Schmidt, you have mentioned, I believe, before the recess, something about the defendant's arrest, that has nothing to do with this case, or with this indictment at all?

"A. None whatsoever."

This is the extent of the testimony upon which prejudicial error is predicated. It clearly appears that the witness Schmidt, a layman unversed in judicial rules of evidence, inadvertently and innocently referred to an arrest of appellant in attempting to fix the time of a certain event. There is not the slightest intimation that the fact of appellant's prior arrest was mentioned intentionally, maliciously, or at the prompting of the prosecuting attorney. It was simply such an immaterial incident as can and does sometimes occur during a trial. The incident is closely

analogous to one that occurred in the case of **Means v. United States**, D. C., 65 F. 2d 206, where a prosecution witness testified that defendant had told her he had been in prison. The appellate court, in holding the admission of this evidence was not error, said: "It is plain that this statement was not brought into the evidence for the purpose of reflecting upon appellant's reputation or character, but was purely incidental to the testimony relating to the conversation between the witness and appellant, which necessarily disclosed the fact that appellant at one time had been an inmate in the Atlanta Penitentiary." Appellant here, in seeking a reversal of this case, relies on **United States v. James**, 2 Cir., 208 F. 2d 124, wherein the court held that the admission in evidence in the government's case in chief of defendant's prior arrest was reversible error. But in that case the testimony concerning defendant's prior arrest came from the lips of a government narcotics officer, who, it may be assumed, was more familiar with courtroom rules of evidence than was witness Schmidt in the present case. Admittedly, this distinction is a thin one, and to the extent that the holding in the **James** case may be inconsistent with our decision herein, we do not apply it. Under the circumstances disclosed in the record here, the admission into evidence of the testimony concerning appellant's prior arrest did not constitute prejudicial error.

Appellant next assigns error on the failure of the trial court to sustain his motion for judgment of acquittal on Count One in No. 15,214, the obstruction of justice indictment. Appellant contends that the evidence of the government was insufficient as a matter of law to prove that Schmidt was, during the time alleged in Count One of the indictment, a "witness" within the intendment of section 1503, 18 U. S. C. A. Count One of the indictment charged, and the government's evidence showed, that appellant's endeavors to influence Schmidt to destroy his records per-

taining to Labor Health Institute transactions were made during the period of February 21-23, 1954. Schmidt testified that it was almost a month later, on March 18, 1954, that he first met the revenue agents who were conducting the investigation of the Labor Health Institute. And it was almost a month thereafter, on April 14, 1954, that Schmidt was subpoenaed and testified before the grand jury. Although the offense charged in Count One allegedly occurred on February 21-23, 1954, Schmidt testified: "I didn't even know on March 18 [1954] that I was going to have to testify. I had never told anybody on March 18th that I wanted to testify. I didn't tell anybody anything. I didn't express any desire to testify on March 18th."

The question of who is a "witness" within the scope and meaning of section 1503 has been before this court. In **Smith v. United States**, 8 Cir., 274 Fed. 351, the person defendant was charged with endeavoring to influence had testified in a case, was discharged and returned home, and had been requested to return for further testimony at the time defendant assaulted him. In disposing of the contention that the person was not under subpoena, and hence was not a "witness" within the meaning of the statute, this court said:

"The terms of the statute, the evil it was enacted to prevent, and the protection it was intended to provide, leave no doubt that under its true interpretation each of those who are subpoenaed to come, of those who are called and accept the call to come without subpoenas, of those who are prompted to come by their interests, of those who expect to come, and of those who are selected and expected to come to testify in any case in any court of the United States, falls within the class described by the terms 'any witness, in any court of the United States,' in the section under consideration."

In **Walker v. United States**, 8 Cir., 93 F. 2d 792, a case charging defendant with endeavoring to influence the testimony of a co-defendant in a pending action, this court held: "It was not necessary to prove that she [the co-defendant] had been subpoenaed. She was such a witness if she then intended to testify on the trial of the case then pending in the District Court." **Smith v. United States**, 8 Cir., 274 F. 351, 353. There is no evidence that she so intended. * * * She did not say she would testify. The government investigator did not ask her to testify. * * * There is no evidence that the government desired to use her as a witness, even if she should waive her immunity."

The decision in **Walker v. U. S.**, supra, is controlling here. The government adduced no evidence to show that on February 21-23, 1954, Schmidt intended, desired, or expected to testify before the grand jury or that the government had or would request him to testify. On the contrary, Schmidt testified that as late as March 18, 1954, he had no desire, intent, or expectation of testifying. On February 21-23, 1954, the only information Schmidt had concerning the grand jury investigation, as we view the record, was what appellant had told him. This is hardly sufficient to qualify him as a "witness" under the statute.

The government urges that the test is "whether or not the defendant has reasonable grounds to believe that the witness will be called before the grand jury, and whether the witness is so called." Such a test might be applicable in determining whether there was the required knowledge or notice on the part of the defendant to authorize a conviction under the statute. We need not now so decide. But we are cited to no case, and have found none, where such a test was used to determine whether a person was or was not a "witness" as that term is used in section 1503, **Odom v. United States**, 5 Cir., 116 F. 2d 996, relied on and quoted in the government brief, does not, in our

opinion, so hold. The quotation from the **Odom** case that: "The knowledge necessary is not absolute or direct knowledge that Stansbury [the witness] had testified or would testify; but information or a reasonably founded belief thereof is sufficient to make the requisite scienter; he being in fact a witness," quite obviously refers to the knowledge of the defendant, as evidenced by the preceding sentence, "Touching the knowledge of the accused, and their specific intent to deal with Stansbury as a witness, the question is closer." The court had no difficulty in the **Odom** case in determining that Stansbury was a witness as he had already testified in a case and was intending to return for another scheduled hearing at the time defendant assaulted him.

We conclude that the government wholly failed to prove that Schmidt was, at the time alleged in Count One of the indictment in No. 15,214, a "witness" within the meaning of section 1503 and that appellant's motion for judgment of acquittal on that count should have been granted. Since appellant was placed on probation for five years on both counts in No. 15,214, our decision on this question becomes important in the event that probation is revoked and appellant brought before the court for sentencing. 18 U. S. C. A., section 3653.

Appellant also assigns as error the admission into evidence, for purposes of impeachment, of his prior grand jury testimony wherein he refused to answer certain questions on the grounds that such answers might tend to incriminate him. The refusal to give appellant's requested instruction to the effect that his failure to testify before the grand jury constituted no evidence of his guilt is also urged as error. Although this court has not had occasion to pass upon this precise question, courts which have done so have uniformly held that the admission of such testimony is proper. **Viereck v. U. S.**, D. C., 139 F. 2d 847; **U. S.**

v. Klinger, 2 Cir., 136 F. 2d 677; **U. S. v. Gottfried**, 2 Cir., 165 F. 2d 360; **U. S. v. Groves**, 2 Cir., 122 F. 2d 87. Also, see and compare the following: **Raffel v. U. S.**, 271 U. S. 494 (evidence of defendant's failure to testify at first trial held proper; **U. S. v. Mortimer**, 2 Cir., 118 F. 2d 266 (evidence of defendant's failure to appear before grand jury held proper); **U. S. v. Buckner**, 2 Cir., 108 F. 2d 921 (evidence of defendant's refusal to testify before Securities and Exchange Commission held proper); **Tomlinson v. U. S.**, D. C., 93 F. 2d 652 (prosecutor's comment upon defendant's failure to testify before grand jury, and upon defendant's explanation thereof, held proper). The rule of law to be drawn from all these cases is that where a defendant elects to take the stand in his own behalf he thereby waives his privilege of immunity and becomes subject to cross-examination and impeachment the same as any other witness. We discern nothing unjust or unfair in this rule. It must be held, therefore, that the admission into evidence of appellant's grand jury testimony was not improper. It was also not error to refuse the requested instruction since the court had made it clear during the trial that the evidence was being admitted to contradict appellant's position taken on the witness stand.

Appellant next contends that the condition imposed in the order of probation in No. 15,214, to-wit, "that during the term of probation the defendant shall not directly or indirectly hold any office in or employment by any organization of labor or any organization affiliated, or sponsored by, a labor union or a labor organization. Such conditions shall not prevent defendant from being a member of any labor organization," was beyond the authority of the sentencing court and ought to be expunged. It seems rather anomalous to us that a person should complain of such an order of probation when it was within the lawful authority of the trial court to have given a sentence of ten years imprisonment and $10,000 fine under the two counts

of the indictment. 18 U. S. C. A., section 1503. However that may be, appellant's argument that the condition imposed in the order of probation constituted an unlawful invasion of his right to earn a living is untenable. The trial court was of the opinion that the rehabilitation of appellant would proceed more effectively if he disassociated himself from all union organizational and administrative activity during the period of probation. Under the provisions of 18 U. S. C. A., section 3651, the trial court "* * * may suspend the imposition or execution of sentence and place the defendant on probation for such period [not exceeding five years] and upon such terms and conditions as the court deems best." The granting of probation and the terms and conditions thereof are matters clearly discretionary with the sentencing court. No abuse of discretion has been shown here.

Appellant's final contention on this appeal is that the trial court erred in refusing to instruct the jury, on the income tax evasion counts in No. 15,215, that it could find appellant guilty of the lesser offense contained in section 3616 (a), 26 U. S. C. A. This point has been decided adversely to appellant's contention by this court in **Dillon v. United States**, 3 Cir., 218 F. 2d 97, and we make the same ruling on the point in this case so that appellant's record thereon is preserved.

The judgment and sentence on Count One in No. 15,214 are vacated and the cause of action set forth in that count is dismissed. Judgment and sentence on Count Two of No. 15,214 and Counts One, Two and Three in No. 15,215 are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

STATUTES AND RULE INVOLVED.

Rule 31 (c), Federal Rules of Criminal Procedure, provides:

Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

26 U. S. C., former Section 145, provides:

(b) **Failure to collect and pay over tax, or attempt to defeat or evade tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

26 U. S. C., former Section 3616 (a), provides:

Whenever any person—

False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000.00, or be imprisoned not exceeding one year, or both, at the discretion of the Court, with costs of prosecution.

Judgment.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,214.

September Term, 1954.

Friday, April 22, 1955.

Louis Berra, Appellant, vs. United States of America.	}	Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment and sentence of the said District Court on Count One of the Indictment in this cause be, and the same are hereby, vacated, and the cause of action set forth in said Count is hereby dismissed.

And it is further Ordered and Adjudged by this Court that the judgment and sentence of the said District Court on Count Two of the Indictment in this cause be, and the same are hereby, affirmed.

April 22, 1955.

Judgment.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,215.

September Term, 1954.

Friday, April 22, 1955.

Louis Berra, Appellant, vs. United States of America.	}	Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Louis Berra, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

April 22, 1955.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954

No. ~~766~~ 60

LOUIS BERRA,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 766.

LOUIS BERRA,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

ARGUMENT.

1. In its memorandum in opposition to petitioner's citation of the case of **United States v. James**, 208 F. 2d 124 (C. A. 2d), the Government takes the position that the mention of petitioner's prior arrest was merely a chance remark not sought by the prosecutor. It is submitted that, without arguing the merit of such an assumption, petitioner's case for review goes far beyond such reliance;

as the record points out (R. 73, 74) the witness' referral to petitioner's prior arrest was specifically noted by the trial judge, who said (R. 74): "It is very material." At the express insistence of the trial judge the prosecutor then asked the witness specifically about the arrest (R. 74). Therefore, it would seem that the error here urged is even more prejudicial and more culpable than that which compelled the United States Court of Appeals to order a reversal and remand in the **James** case, supra.

Also, the government has sought to distinguish the **James** case, supra, on the "thin" ground suggested by the court below, namely, that the witness in the **James** case may be assumed to have been more familiar with court room rules of evidence than the witness Schmidt in the present case. The danger and the absurdity in determining an individual's right to a fair trial by the weighing of such assumptions is perfectly illustrated by the present record. The witness Schmidt was a twice-convicted felon (R. 66); therefore, should not he be assumed to have had some familiarity with the court room rules of evidence? How does such familiarity of a twice-convicted felon compare with that of a government narcotics agent? Is it more, or less, or about the same? To ask these questions is to answer them.

2. In treating the problems raised in the petition for certiorari concerning the proper application of **Commissioner v. Wilcox**, 327 U. S. 404, the government is guilty of one serious misstatement of fact totally unsupported by the record. Contrary to the statement at page 4 of the government's memorandum in opposition, the checks drawn on the Labor Health Institute's bank account and paid to Schmidt for the padded amounts were not **countersigned** by petitioner; they were **signed** by petitioner whose signature was the prime signature and petitioner's signature was countersigned by some other employee (R. 55,

120, 128). This is important in determining the petitioner's possession of the misappropriated funds; the fact that petitioner's signature was customarily countersigned would not reflect on his possession of his employer's funds, since the function of a countersignature is merely to attest the authenticity of the prime signature. (See the cases cited in Example 6, p. 22 of the Petition herein filed.) It is interesting to note also that the government finds the opinion of the court below to be correct—but for the wrong reason. In its opinion the court below found the lack of the requisite possession for embezzlement because the funds went first to Schmidt and then to petitioner (Appendix, 33, Petition); now the government seeks to base petitioner's lack of possession on the fact that his signature was countersigned—and this despite his admitted control and access to his employer's funds. This injects a line of reasoning into the case which neither court below found significant in view of the authorities cited defining the legal aspects of the countersignature requirement. Even in a case where the accused embezzler only had the right to countersign (his was not the validating signature) has the Supreme Court of Kansas held these to be sufficient possession and care for embezzlement. **State v. Johnson**, 109 Kan. 239, 199 P. 104 (1921). The defendant was president of the Railroad Men's Refining Company, a corporation. The corporation's by-laws provided that the treasurer should have custody of all the money of the corporation, and that its funds should be deposited in such bank as the directors should designate and withdrawn only upon the check or order of the treasurer "or other person designated by the management," the defendant-president being required to countersign all checks. The practice was for the defendant to sign checks drawn against the corporation's deposit, and for the bank to pay them. In rejecting the defendant's argument that he could not be convicted of embezzlement because he did not have the pos-

session or care of the money he was charged with embezzling, the Court wrote, 199 P., l. c. 106:

> "Whether or not the practice was in strict accordance with the by-laws, the conduct of the defendant is to be judged by the practical rather than the technical aspect of the matter. The funds of the company, being on deposit subject to checks signed by the defendant were in his possession and under his care in such sense as to make his appropriation of a part of them to his own use an act of embezzlement. It was not necessary to a conviction that his possession or care of the corporation's money deposited in the bank should have been exclusive."

CONCLUSION.

For the reasons submitted herein and in the Petition for Writ of Certiorari heretofore filed, petitioner submits that the questions presented are important to the administration of justice. One question presents a direct conflict between Courts of Appeals. Another question involves the taxation of criminally obtained funds which is currently vexing the lower courts; still another question involves the mechanics of the Fifth Amendment. Lastly, the government has conceded that certiorari should be granted on the question of the misdemeanor instruction. This will involve this Court's consideration and review of the facts in the instant case; such review will raise inherently the several issues here presented. It is submitted that this question should not be considered *in vacuo*, as suggested by the government, and certiorari should be granted on the entire case.

Respectfully submitted,

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No. 60.

LOUIS BERRA,
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SUPPLEMENTAL BRIEF FOR PETITIONER.

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ARGUMENT.

Since this Court adjourned on June 6, 1955, without having acted on the above-captioned petition, there have been during the summer recess certain significant developments in connection with one of the questions presented which petitioner now calls to the Court's attention. The particular question involved is the third of those presented on pp. 2-3 of the original petition concerning the applicability to the instant case of **Commissioner v. Wilcox**, 307

U. S. 404, holding embezzled funds not to be taxable income. On June 2, 1955—the day on which petitioner's reply brief herein was filed—the United States Court of Appeals for the Second Circuit rendered in the case of **Estate of Jacob J. Dix v. Commissioner of Internal Revenue**, now reported at 223 F. 2d 436, a decision contrary to that rendered by the United States Court of Appeals for the Eighth Circuit in the instant case, now reported at 221 F. 2d 590. The **Dix** case had been argued and submitted on April 21, 1955—the day before the Eighth Circuit's decision in the instant case on April 22, 1955. Petitioner's case decided by the United States Court of Appeals for the Eighth Circuit was thus not mentioned in the **Dix** briefs; otherwise, it is felt the apparent conflict between the two would have been considered in the later opinion of the Second Circuit. Of particular importance to the consideration of this petition is that the government has now petitioned this Court for certiorari to review the very issue involved (i. e., the applicability and vitality of the **Wilcox** case) in No. 363, October Term, 1955. In view of the government's position taken on behalf of the Commissioner of Internal Revenue in its own petition for certiorari (see pp. 11-15, No. 363), that the question is of substantial importance in the administration of the revenue laws and one which is constantly perplexing the lower courts, petitioner submits that it would best serve the interests of justice to grant certiorari in both cases and to have them argued and submitted simultaneously so that the **Wilcox-Rutkin** conflict can be clearly and explicitly defined for the guidance of the lower courts, the government, and taxpayers alike.

In brief, the question of the taxability of misappropriated funds arose in the **Dix** case, as in the instant case, because the taxpayer utilized his authorized power to draw on corporate bank accounts by diverting funds to his own personal use. Some of the diverted funds were withdrawn from the corporate bank account solely on the signature

of the taxpayer Jacob Dix; others were withdrawn by checks signed by the taxpayer and his son or by his son alone, who was another corporate employee, see Findings of Fact in 12 T. C. M. 536. In answer to the taxpayer's reliance on the **Wilcox** case in the Tax Court, Judge Van Fossan held the **Wilcox** case inapplicable and the **Rutkin** case to be controlling because the taxpayer had acquired the funds by fraud and deceit; on this basis and limiting the **Wilcox** case strictly to its facts, the Tax Court ruled the misappropriated funds were properly includible in income. The reversal of the Tax Court's ruling by the United States Court of Appeals in the **Dix** case is important, and the conflict between the **Dix** case and the instant case is readily seen when it is recalled that it was on the basis of petitioner's so-called fraud and deceit that the United States Court of Appeals for the Eighth Circuit distinguished **Wilcox** in the instant case and ruled adversely to petitioner. The position taken by the court in the instant case is in accord with the dissent expressed by Judge Hincks of the Second Circuit in the **Dix** case, 223 F. 2d 438, and the Tax Court opinion of Judge Van Fossan. It is noteworthy, also, that Judge Hincks regards the **Rutkin** case as having overruled **Wilcox**; while, on the other hand, the majority of the **Dix** court saw the case as one of embezzlement with the vitality of **Wilcox** still in effect.

Necessary to the decision of the Second Circuit in the **Dix** case that the funds were embezzled by the taxpayer's unauthorized withdrawals was the acceptance of the principle so strongly urged and rejected by the two courts below in the instant case; namely, that the right of an employee to draw on his employer's funds on deposit in a bank constitutes possession thereof so that a subsequent misappropriation gives rise to the crime of embezzlement. Here, too, the cases are in conflict. Subsidiary to this issue is the **Dix** court's failure to find that the son's signature on certain of the checks representing the misappropriated

funds, either alone or with the taxpayer's, removes the requisite possession. In both such respects, the **Dix** opinion refutes the distinctions between the instant case and **Wilcox** suggested at p. 7 of the Memorandum for the United States filed herein.

The reasons stated in the government's petition for certiorari in **Commissioner of Internal Revenue v. Estate of Jacob J. Dix**, No. 363, October Term, 1955, with respect to the need for this Court's review of the **Wilcox-Rutkin** problem are compelling; in substance, they bear out the grounds previously stated in the instant petition and represent a change from the government's position as set forth in Memorandum for the United States filed herein, pp. 6-8. Whereas the government originally argued in its Memorandum in opposition that the **Wilcox** case was not applicable because the crime was not embezzlement, it states in the **Dix** petition as a reason for granting certiorari that it is important to settle the question because prosecutions have been authorized where the disputed income apparently came from embezzlements or closely analogous crimes. It points out the conflict between the **Dix** case and **Kann v. Commissioner**, 210 F. 2d 247, and infers the better rule is to be found in the latter case, where the Third Circuit held that it was not material to determine whether the taxpayers were technically guilty of embezzlement under local law. Whereas the government here argued that funds in a corporate bank account subject to an employee's withdrawal are not in his possession, it takes no issue with such a holding in the **Dix** case. Whereas the government originally had no difficulty in drawing from the **Rutkin** case "the proper test of whether unlawful gains constitute income" (p. 7, Memorandum for the United States), it now concedes that there has been brought into "sharp focus the difficulty of attempting to reconcile **Wilcox** and **Rutkin**" (p. 11, Petition, No. 363). Whereas the government originally cited as categorical authority for the denial of

the instant petition the cases of **Rollinger v. United States**, 208 F. 2d 109 (C. A. 8th), **Briggs v. United States**, 214 F. 2d 699 (C. A. 4th), and **Marienfeld v. United States**, 214 F. 2d 632 (C. A. 8th), it now tells us that these cases have made evident the "well-founded uncertainties" of the lower courts as to the status of **Wilcox**. Petitioner suggests that the list of cases cited in the government's petition in the **Dix** case (p. 14, No. 363) as typical of these uncertainties is incomplete with the inadvertent omission of **Berra v. United States**, 221 F. 2d 590; in view of its conflict with the **Dix** opinion both in spirit and principle it amply supports the government's thesis expressed therein.

CONCLUSION.

The government has already announced that it does not oppose certiorari on one question herein presented. Another question presents a direct conflict between Courts of Appeals. Since this Court's recess in June, 1955, the government itself has recognized the important nature of the embezzlement issue and in a separate petition to review a judgment of the Second Circuit has requested certiorari for substantially the same reasons set forth in the instant petition. This case and the **Dix** case, No. 363, present convenient vehicles for this Court to lay down some readily understood principles defining the limits and meaning of the **Wilcox** and **Rutkin** cases, if those cases are to continue as controlling. On the one hand, this case offers the simple situation of a trusted employee who with the aid of a confederate misappropriates his corporate employer's funds; on the other hand, the **Dix** case offers the more complex situation of an employee who misappropriates his corporate employer's funds when the employee is at all times a major recipient of the corporation's dividends. The latter situation may raise serious questions as to whether or not the misappropriated funds constitute constructive dividends to the wrongdoer and, therefore, income. Yet each

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BRIEF FOR THE PETITIONER.

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case presents an important facet of the basic inquiry as to how misappropriated funds shall be taxed. Considered together, the opinions to be written would complement each other and present a total answer. It is submitted that certiorari should be granted on all issues in the instant case; and in the manner of the recent "net-worth" cases argument should be held and this case considered together with **Commissioner of Internal Revenue v. Estate of Jacob J. Dix**, No. 363, October Term, 1955, if this Court should grant certiorari in the latter case.

Respectfully submitted,

STANLEY M. ROSENBLUM,
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SECOND SUPPLEMENTAL BRIEF FOR PETITIONER.

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SECOND SUPPLEMENTAL BRIEF FOR PETITIONER.

ARGUMENT.

This brief is being filed to advise the Court of the death on October 20, 1955, at St. Louis, Missouri, of petitioner Dillon in **Dillon v. United States**, No. 37, this Term, in which certiorari was granted on April 25, 1955. At first glance the reader might wonder what reason there could be prompting petitioner Berra in the instant case to bring this matter to the Court's attention, perhaps even before

the respective parties in that case have done so. This action is here taken in the light of this Court's well established precedent that upon the suggestion of petitioner Dillon's death the writ of certiorari, previously granted, will be dismised, **Singer et al. v. United States**, 328 U. S. 338; **United States v. Johnson**, 319 U. S. 503. It will be recalled that the main question on which petitioner Dillon's writ was granted is equally present in the instant case, namely, the necessity of a misdemeanor instruction under Section 3616 (a) in a felony prosecution for income tax evasion under Section 145 (b) of the 1939 Internal Revenue Code; also, it should be noted that to this extent (because of the question common to both cases) the government does not oppose certiorari in the petitioner's case. Therefore, petitioner submits that, the importance of resolving the question to the administration of justice having been once recognized by this Court, certiorari should be granted in the instant case to settle this still vital question; it would seem immaterial to the administration of justice whether this is done under the name of **Dillon v. United States** or **Berra v. United States**. For this reason in addition to those previously stated in the briefs heretofore filed, petitioner submits that certiorari should be granted on the entire case to review the several questions herein presented.

Respectfully submitted,

STANLEY M. ROSENBLUM,
MARK M. HENNELLY,
Counsel for Petitioner.

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BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals (R. 247-258) is reported at 221 F. 2d 590.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 22, 1955 (R. 259-260). The petition for a writ of certiorari was filed on May 2, 1955, and was granted on

December 5, 1955, limited to question (2) presented by the petition (R. 262). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

Whether the trial court should have instructed the jury that petitioner, who had been indicted for the felony of attempted evasion of income taxes (according to the statute endorsed on the indictment), could be convicted of the misdemeanor of filing a fraudulent return with intent to defeat the assessment.

STATUTES AND RULE INVOLVED.

Rule 31 (c), Federal Rules of Criminal Procedure, provides:

Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

26 U. S. C., former Section 145, provides:

(b) **Failure to collect and pay over tax, or attempt to defeat or evade tax.** Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

26 U. S. C., former Section 3616 (a), provides:

Whenever any person—

False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000.00, or be imprisoned not exceeding one year, or both, at the discretion of the Court, with costs of prosecution.

STATEMENT.

Petitioner was convicted on all counts of a three-count indictment charging an attempt to evade certain income taxes for the years 1951, 1952 and 1953 by filing fraudulent returns. The statute alleged to have been violated on the face of the indictment was Title 26, U. S. C. A., Section 145 (b) (R. 5-7, 221-222). The amounts of income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Count I (1951)	$5,177.22	$566.54	$8,669.88	$1,324.42
Count II (1952)	5,514.50	691.42	7,464.50	1,149.86
Count III	5,293.34	775.52	6,193.34	984.76

Petitioner was sentenced to four years imprisonment on each of the three counts, the sentences on all counts to run concurrently (R. 235).

Petitioner during the years 1951, 1952 and 1953 was the business manager of the St. Louis Labor Health Institute, a non-profit organization furnishing free medical care to members of Teamsters' Local 688, A. F. of L., and their families (R. 51-54). The Labor Health Institute is operated on funds collected from employers who maintain collective

bargaining agreements with Local 688 (R. 51). As business manager of the Labor Health Institute, petitioner controlled the organization's bank account (R. 120); he personally approved payment of all bills incurred by the Labor Health Institute and drew and signed the checks therefor (R. 55, 120, 128, 153). The checks were counter-signed by another employee (R. 55, 120, 128). In 1949 the Labor Health Institute contracted with J. Shulman and Sons Contracting Company for extensive alteration work on its premises in St. Louis (R. 133). The general contractor subcontracted the painting work to one John Schmidt (R. 67, 79). In 1950, after the original painting contract was completed, Schmidt was called back by the Labor Health Institute for further work (R. 67). Schmidt testified that petitioner then approached him with a plan whereby he, Schmidt, would submit padded bills to the Labor Health Institute by overstating his amount of labor performed; petitioner, knowing of Schmidt's overstatements, would approve the bills, sign and draw checks in his capacity as business manager on the organization's bank account to Schmidt, issue payment to Schmidt, and then Schmidt would return the amount of the overpayment to petitioner (R. 67). It was Schmidt's testimony, and some of his checks were introduced in substantiation, that petitioner had received some $5,000.00 under this arrangement during the years 1951, 1952 and 1953 (R. 71, 72). During these same three years Schmidt testified that he did approximately $2,500.00 to $3,000.00 worth of painting at petitioner's home which, with petitioner's knowledge and connivance, he charged in his billing to the Labor Health Institute and received payment in the same way; that is, petitioner approved his bill, knowing it was overstated, drew and signed the organization's check, and issued payment to Schmidt (R. 72, 73). The evidence also showed that in 1951 petitioner had the J. Shulman and Sons Contracting Company subcontract for certain con-

crete work at his home and build a knotty pine rathskellar in his basement (R. 57, 59-62, 136). The cost of this work (some $1,500.00) was recovered by the J. Shulman and Sons Contracting Company by billing it to the Labor Health Institute, securing petitioner's approval of the bills, and petitioner's issuing checks in payment, signed by him in his capacity as business manager and drawn on his employer's checking account (R. 135). These amounts constituted the alleged unreported income received by petitioner during the three years in question.

Petitioner requested that the jury be instructed that it might find him guilty of a lesser crime than the one endorsed on the indictment (R. 216, 217). Specifically, this instruction would have told the jury to find him guilty of a violation of Section 3616 (a) of the Internal Revenue Code of 1939 if it believed he had delivered a false income tax return to the Collector with intent to defeat or evade the assessment of the tax (R. 216, 217). The trial court refused petitioner's request (R. 214). The Court of Appeals affirmed the conviction (R. 258) and ruled adversely to petitioner on this issue, relying on its earlier case of **Dillon v. United States**, 8 Cir., 218 F. 2d 97. The rationale of the **Dillon** case is that no lesser instruction was required because Section 3616 (a) is inapplicable to income tax violations.

SUMMARY OF ARGUMENT.

Section 3616 (a) of the Internal Revenue Code of 1939 applies to income tax derelictions. The Government so conceded in its brief opposing certiorari, **Dillon v. United States**, No. 37, this Term. It has frequently been utilized in the prosecution of income tax cases. The language "with intent to defeat or evade" clearly indicates the necessity for proof of wilfulness. The enactment of the predecessor of Section 3616 (a) as part of a Revenue Act which included income tax, its collocation in the Internal Revenue Code of 1939, and its incorporation in Section 7207 of the Internal Revenue Code of 1954, all indicate its applicability to fraudulent income tax returns. The Government also conceded that Section 3616 (a) prohibits a wilful attempt to evade income taxes by filing fraudulent returns. This view is supported by the plain language of Section 3616 (a) in proscribing against the filing of "fraudulent" returns "with intent to defeat or evade . . . the assessment." Section 145 (b) also forbids a wilful attempt to evade income tax by filing fraudulent returns.

Under an indictment, citing Section 145 (b) of the Internal Revenue Code of 1939, a felony, and charging an attempt to evade income taxes by filing a false and fraudulent return, the trial court should have instructed the jury, as requested, that defendant could be convicted of the misdemeanor under Section 3616 (a) which section, as conceded by the Government, specifically prohibits the filing of a false and fraudulent return for the purpose of evading taxes. A violation of the lesser offense was charged in the indictment. It was "necessarily included" in the allegations of the indictment under Rule 31 (c) of the Federal Rules of Criminal Procedure which authorizes a conviction for an offense "necessarily included in the offense charged" by being included in the acts alleged

in the indictment and was thus sufficiently charged. A defendant is informed of the "essential facts constituting the offense" by the allegations of the indictment and not by the statute cited or by the statutory definition of the greater offense. The prosecution is not limited to the statutory citation but may have every offense sufficiently charged submitted. The accused should have the same right. Moreover, the prosecution ought not to fail when it fails to prove an allegation charged, if it proves sufficient facts constituting a crime of which defendant has had notice. There are state court decisions interpreting statutory counterparts of Rule 31 (c) which support this interpretation and a contrary rule has not been established by the Courts of Appeal.

Moreover, the Government has conceded that the indictment in the **Dillon** case which is substantially the same as the instant indictment charged a violation of Section 3616 (a) by saying that Sections 3616 (a) and 145 (b) are "two statutes, each of which punishes exactly the same act." The Government's position fails to recognize that the Section 145 (b) felony under the instant indictment is the more aggravated offense encompassing the misdemeanor under Section 3616 (a). In essence, its position is that the United States Attorney may choose under which section to prosecute and punish "exactly the same act" and, once having so elected, this choice is unalterably binding on a defendant. No ascertainable standards are present under the Government's view to guide the United States Attorney in his decision except, that Section 3616 (a) is to be reserved for what is vaguely referred to as "minor" offenders. Whether the standard "minor" as contrasted with "major" is to guide in terms of wilfulness or the size of the taxpayer's deficiency, we are not told. On the other hand, petitioner suggests that the difference between the two statutes lies in the degree of wilfulness exerted with a tax evasion motive and this is properly a

jury question under Rule 31 (c). Permitting the jury to resolve whether a defendant is guilty of a felony or a misdemeanor under Rule 31 (c) (where the pertinent statutes, the indictment, and the evidence will support both) would avoid any constitutional questions raised permitting persons guilty of "exactly the same act" to be unreasonably discriminated against by being made subject to disparate punishments and by permitting the United States Attorney's discretion in such regard to be exercised without any ascertainable standard.

Even if a "necessarily included" offense must be embraced within the statutory definition of the greater offense, the misdemeanor under Section 3616 (a) is embraced within the greater offense of Section 145 (b). Although Sections 3616 (a) and 145 (b) are couched in different language, they cover the same type of derelictions.

ARGUMENT.

Section 3616 (a) of the Internal Revenue Code of 1939, a Misdemeanor Which Forbids the Filing of a Fraudulent Return With Intent to Defeat the Assessment Is "Necessarily Included in the Offense Charged" Under the Instant Indictment Charging an Attempt to Evade Income Taxes by Filing a Fraudulent Return, a Felony Under Section 145 (b) of the Internal Revenue Code of 1939 (the Statute Endorsed on the Indictment), and the Trial Court Should Have Instructed the Jury, as Requested, That Petitioner Could Be Convicted of the Lesser Offense.

The trial court refused a requested instruction which would have permitted the jury to convict petitioner of a misdemeanor under Section 3616 (a) of the Internal Revenue Code of 1939 (R. 214-217). The court below affirmed the conviction on the basis of its prior ruling in **Dillon v. United States**, 8 Cir., 218 F. 2d 97, holding that petitioner was not entitled to a lesser offense instruction because Section 3616 (a) was inapplicable to income tax violations (R. 258). The court in the **Dillon** case concluded "both from the language of Section 3616 and the statutory context where it was formally placed, that it was never intended to apply to income tax violations," 218 F. 2d, l. c. 103. The court, in reaching this result, found that Section 7207 of the 1954 Internal Revenue Code which replaced Section 3616 was broad enough to apply to income tax derelictions and that the "element of willfulness, absent in Section 3616 but previously consistently present in offenses relating to income tax violations, was inserted," 218 F. 2d, l. c. 103.

But the Government has conceded in its brief in opposition to the petition for certiorari filed in **Dillon v. United States**, No. 37, this Term, that Section 3616 (a) does apply

to income tax returns and that the court below was wrong in this premise, Brief for the United States in Opposition, **Dillon v. United States**, pp. 7-8. The language "with intent to defeat or evade" clearly indicates the necessity for proof of wilfulness. Moreover, the mere omission of the word "wilful" in a criminal statute would not eliminate intent as an element of the offense. **Morissette v. United States**, 342 U. S. 246. The predecessor of Section 3616 was enacted in 1864 as part of a Revenue Act which imposed an income tax and provided for income tax returns.[1] Section 3616 is collocated in the Internal Revenue Code of 1939 next to Sections 3614 and 3615 which authorize the issuance of summons for the inspection of records for the determination of tax liability, including income tax liability. These all point to its applicability to fraudulent income tax returns. Section 3616 is incorporated into Section 7207 of the Revenue Act of 1954 which the court below found applied to income tax derelictions. It overlooked the fact, however, that both the Senate and House Committee Reports relative to Section 7207 state that it did not change existing law.[2]

The applicability of Section 3616 to fraudulent income tax returns has been tacitly assumed in a number of cases. **Ex parte Cohen**, 9 Cir., 191 F. 2d 300, certiorari denied, 342 U. S. 947; **Taylor v. United States**, 9 Cir., 179 F. 2d 640, 643-644; **Kirsch v. United States**, 8 Cir., 174 F. 2d 595, 597-598; **Slick v. United States**, 7 Cir., 1 F. 2d 897; **Ex parte Berkoff**, D. Minn., 65 F. Supp. 976, 979-981; **United States v. Koppelman**, M. D. Pa., 61 F. Supp. 1007, 1008-1009.

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[1] Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281-285. § 3616 was more immediately derived from R. S. § 3179.

[2] The Senate Report states: "This section, which is identical with the House Bill, contains no material change in existing law." S. Rep. No. 1622, 83rd Cong., 2nd Sess. (1954) 603, 1954 U. S. Code Congressional Service 3251. The House Report is identical. H. R. Rep. No. 1337, 83rd Cong., 2nd Sess. (1954) A. 425, 1954 U. S. Code Congressional Service 1111.

In regard to Section 3616 (a) the Government has also conceded that this statute specifically punishes a wilful attempt to defeat income taxes by filing fraudulent returns. The Government said in regard to both Section 3616 (a) and Section 145 (b) that they are "two statutes, each of which punishes exactly the same act. Each prohibits a wilful attempt to evade and defeat income taxes . . . whenever a taxpayer does file a false return with intent to defeat the tax, the evidence will justify a conviction under either statute." Brief for the United States in Opposition, **Dillon v. United States**, p. 10. Section 3616 (a) makes it an offense to deliver or disclose to the collector "any false or fraudulent . . . return . . . with intent to defeat or evade the valuation, enumeration or assessment . . ." A "false" return by itself might be a return which is merely incorrect due to negligence or some other cause lacking intent and would not necessarily involve an attempt to evade taxes if it were delivered to the taxing authorities. But a "fraudulent" return would include an intent to deceive and an intent to deprive the government of taxes. A "false or fraudulent" return could by a strained construction refer to a false return only. However, anyone who delivers or discloses a false or fraudulent return "with intent to defeat or evade the . . . assessment" is attempting to defeat and evade his taxes. There can be no real difference between this language employed in these sections. Consequently Section 145 (b) and Section 3616 (a) both prohibit a wilful attempt to evade and defeat income taxes and both offenses were charged under the instant indictment in view of the categorical holding in **United States v. Beacon Brass Co.**, 344 U. S. 43, 46, that the felony includes evasion by means of the filing of a fraudulent return.

Under Rule 31 (c) a lesser offense must be "necessarily included in the offense charged."[3] The Government has

[3] Under a charge of murder, defendant may be convicted of manslaughter. *Stevenson v. United States*, 162 U. S. 313, 315; *Wallace*

sought to confine the application of this Rule to the single instance where the lesser offense must be included in the statutory definition of the greater offense, relying on the definition quoted with approval by the Ninth Circuit in **Giles v. United States**, 144 F. 2d 860, 861: "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." The Government has taken the position that Section 3616 (a) is not so included in Section 145 (b) because the felony may be committed without perpetrating the misdemeanor and that "one cannot commit the misdemeanor of delivery of a false income tax return with intent to evade the assessment without at the same time committing the felony of attempted tax evasion." Brief for the United States in Opposition, **Dillon v. United States**, pp. 10-11. Presumably, the Government relies on one's ability to commit the felony without filing any return at all, see **United States v. Smith**, 3 Cir., 214 F. 2d 887 and **United States v. Kafes**, 3 Cir., 206 F. 2d 905, while the Government contends that the misdemeanor in Section 3616 (a) is impossible to commit without some affirmative act of delivery or disclosure of the fraudulent return or other false information. Petitioner submits that, while the precise issue is one of first impression in this Court, reason and authority support the interpretation that the language employed in Rule 31 (c) comprehends that a lesser offense is "necessarily included" if it is fairly charged by the indictment. A lesser offense is fairly charged if it is included in the acts alleged in the indictment as constituting the greater offense whether or not the greater may be committed without perpetrating the

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v. United States, 162 U. S. 466, 472. Under an indictment charging robbery, defendant may be convicted of larceny. *Lamore v. United States*, D. C. Cir., 136 F. 2d 766. A suggestion as to its application under the Gambler's Occupational Tax Act, 26 U. S. C. A., former §§ 3294 (c), 2707 (b), is found in *United States v. Kahringer*, 3 Cir., 210 F. 2d 565, 571-572.

lesser.[4] Petitioner has no quarrel with the Government's statement (as far as it goes) of the theory of the necessarily included offense as postulating "a gradation in which the greater offense contains some aggravating incident not found in the lesser", Brief in Opposition, **Dillon v. United States**, p. 9, but merely calls to the Court's attention the accepted corollary of the theory that "where an indictment charges not only the major offense, but also in terms charges a lesser offense, accused may be convicted of the lesser offense, even though not forming a constituent part of the major offense charged", 42 C. J. S., § 271, p. 1295; 22 Cyc. 468.

It is elementary that an accused must be given fair warning of the charges facing him. The nature of his accusation is learned from the allegations of the indictment and not from any particular statute.[5] "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment if the charges made are embraced by some statute." **Williams v. United States**, 168 U. S. 382, 389.[6] Indeed, the accused must be prepared

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[4] Rule 31 (c) was a restatement of existing law, 18 U. S. C. A., former § 565, which provided:

> "In all criminal causes the defendant may be found guilty of any offense the commission of which is *necessarily included in that with which he is charged* in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense."

The emphasized portion contains no suggestion of the limitation urged by the Government.

[5] Rule 7 (c), Federal Rules of Criminal Procedure, states in part:

> "The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

[6] It is interesting that the word "feloniously" is nowhere employed in the instant indictment so that only the endorsement thereon of Section 145 (b) indicates an intent to prosecute petitioner for a felony. The word "feloniously," even where present in the indictment, probably does not add to the allegations since its omission does not affect the accusation. *United States v. Staats*, 8 How. 41, 49 U. S. 41; *United States v. Amorosa*, 3 Cir., 107 F. 2d 596, 598.

to defend in one count of an indictment against allegations which may constitute violations of several statutes. In **United States v. Tommasello**, 2 Cir., 160 F. 2d 348, 351, one count of the indictment was drawn under a particular statute, but stated facts sufficient to plead an offense under two other statutes as well. The court held that a conviction might be had under any of the three statutes.

Since the prosecution is not limited to the statutory citation in the indictment when the language is sufficient to charge still another or other offenses, the defendant is entitled to have each such other offense submitted to the jury, especially where it is lesser in nature. Failure to charge as to each such offense supported by the evidence might well result in a verdict of guilty on a major offense because the jury believes the defendant guilty of only certain elements of wrongdoing, but when left with the alternative of either entirely acquitting him or convicting him, they will find guilt on the only offense submitted.

The construction urged aids the prosecution as well as the accused. There are occasions where a defendant is shown to be guilty of wrongdoing, but his derelictions are not such as to support every allegation in the indictment. The proof may fail as far as one of the elements charged is concerned. Under such circumstances the defendant should not be acquitted and then tried anew for the lesser violation. The prosecution should request a lesser offense instruction; there is no injustice to require him to face the remainder of the allegations in the indictment. There is more reason for this view than one requiring him to defend against the statutory definition of the major crime charged. "It is the statutory as well as a common law rule that a prosecution ought not to fail for lack of proof if the crime charged is shown to have been committed in a lesser degree than charged in the indictment." **People ex rel. Poulous v. McDonnell**, 302 N. Y. 89, 91, 96 N. E. 2d 614, 615.

Petitioner does not believe any contrary rule has been established by the various circuits. The Ninth Circuit in **Giles v. United States**, 144 F. 2d 860, 861, quoted with approval the following definition of necessarily included offense as used in **House v. State**, 186 Ind. 593, 117 N. E. 647: "To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser." It should be noted that in **Giles** there was no evidence to support the lesser offense and no such instruction was requested.

However, in **Barbeau v. United States**, 193 F. 2d 945, 946-948, the Ninth Circuit held that negligent homicide was included under a first-degree murder charge, which alleged purposeful killing, with deliberation and premeditation. It is not impossible to commit first-degree murder without first having committed a negligent homicide. And the killing of a person by negligence is not necessarily included in the statutory definition of murder in the first degree, which is a killing done purposely with deliberation and premeditation. The most that can be said is that the lesser offense was fairly charged in the indictment.

In **Gaunt v. United States**, 1 Cir., 184 F. 2d 284, 289-290, one count of the indictment charged an attempt to evade income taxes by filing a fraudulent return. Another count charged the making of fraudulent statements within the jurisdiction of a department of the United States by filing a fraudulent income tax return in violation of 18 U. S. C. A., former § 80 (now 18 U. S. C. A., § 1001). The court held that the latter charged a crime within the crime charged in the former. If this offense is embraced within Section 145 (b), a fortiori, Section 3616 (a) is so embraced.

Furthermore, there are decisions by the appellate courts of the various states which support the construction of

Rule 31 (c) here urged, namely, that such an instruction shall be given where a lesser offense is necessarily included in the averments set forth in the indictment and the record discloses proof of such lesser offense. These cases either interpret statutory counterparts of Rule 31 (c) or purport to be bottomed on sound common law principles; one case, **People v. Miller**, 143 App. Div. 215, 128 N. Y. S. 549, aff'd, 202 N. Y. 618, 96 N. E. 1125, is rested on both bases. In **People v. Miller**, supra, affirmed per curiam by the New York Court of Appeals, the court sought to construe Section 445 of the Code of Criminal Procedure reading: "In all other cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment." The defendant had been convicted of a lesser offense which conviction he contended was unlawful since it was not embraced within the statutory definition of the crime for which he had been indicted. He argued, as does the Government in its Brief in Opposition, **Dillon v. United States**, pp. 9-11, that this was exclusive and a necessary condition precedent before such an instruction could be given or lesser conviction returned. After considering the problem and deciding that the statute should be so construed that it is sufficient to sustain a conviction for the lesser offense if the acts constituting it are necessarily included in the acts charged in the indictment as constituting the graver offense, the New York court concluded with its understanding that such was the rule at common law of which the Code section was merely declaratory. To the same effect is **State v. Hanks**, 58 Ariz. 77, 118 P. 2d 71, where the Supreme Court of Arizona interpreted Section 44-1923, Arizona Code 1939, providing that "Upon an indictment or information for any offense, the jurors may convict the defendant of * * * any offense which is necessarily included in the offense charged." The court recognized the theory of gradation postulated by the Government and went on to hold that

the statute without exception has been so construed as to permit the conviction also of a defendant of any lesser offense included in the greater by virtue of the fact that the circumstances constituting the lesser are properly alleged in the indictment charging the greater.

Typical cases which do not appear interpretative of particular statutory counterparts of Rule 31 (c), but which reach the same conclusion, are **Stapleton v. Commonwealth**, 140 Va. 475, 124 S. E. 237; **Brown v. Hollowell**, 197 Iowa 1352, 199 N. W. 257; **Watson v. State**, 116 Ga. 607, 43 S. W. 32; **Moore v. State**, 151 Ga. 648, 662, 663, 108 S. E. 47, 54; **Barton v. State**, 58 Ga. App. 554, 199 S. E. 257. In **Stapleton v. Commonwealth**, 140 Va. 475, 124 S. E. 237, an indictment charged both burglary and larceny and the defendant was convicted of larceny alone. The court found that although larceny was not a constituent part of burglary, a conviction for the lesser crime of larceny was proper. The court there said (124 S. E. at 240-241):

> "The case does not fall within the control or influence of such cases as the Hardy and Curry Case, 17 Grat. (58 Va.) 592, strongly relied on for the accused in which the indictment in terms charges only one major offense, which is held to also embrace the charge of all lesser offenses which are incident to and constitute elements of the major offense. In such cases, only such lesser offenses as are in their nature constituent parts of the major offense can be considered as charged in the indictment, and conviction of such character of lesser offense only can be had and enforced under such an indictment. But such an indictment as that in the instant case is not one which in terms charges only one major offense. It in terms charges both the major and the lesser offense in question, and the conviction of the lesser offense charged may be had and enforced under such an indictment,

because, as aforesaid, the indictment contains a competent specific charge of the lesser offense at common law, and not because the lesser offense is of such character that it is an element of the major offense charged."

Therefore, in the instant case consistent with the Government's position that Sections 3616 (a) and 145 (b) each prohibits a wilful attempt to defeat and evade taxes is the conclusion that the allegations of the indictment charged both the greater and lesser offenses. The lesser was therefore "necessarily included" because it was fairly charged by being included in the averments of the indictment.

While petitioner is willing to accept the Government's thesis that, whenever a taxpayer files a false return with intent to defeat the tax, the evidence will justify a conviction under either statute (as in the instant case), petitioner is unable and unwilling to accept the Government's conclusion that by its original endorsement of a statute number on the indictment it has therefore finally and completely ordained that a defendant is to be charged, tried and convicted under the statute carrying the more serious penalty—and no other. Brief of the United States in Opposition, **Dillon v. United States**, p. 11. Petitioner complains that any indictment—by virtue of anything included in or omitted from its face by the United States Attorney drawing the indictment—should preclude him from Rule 31 (c) when the pertinent statutes and the evidence are to the contrary. When the crimes committed by different individuals are the same, they must be punished in the same manner, by the same range of punishment. Punishment for the same offense may be more severe only if there is a rational basis for difference in punishment such as a prior conviction. E. g., **Moore v. Missouri**, 159 U. S. 673, 678; **Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe**, 302 U. S. 51, 54. An unreasonable discrimination in

punishment among defendants would violate the due process clause of the Fifth Amendment to the United States Constitution. In **State v. Cory**, 282 P. 2d 1054 (Or. 1954), a portion of a habitual criminal act giving the district attorney unlimited discretion to determine whether he will or will not proceed against a person who had previously been convicted of a felony was held to deny equal protection of the law because there was no classification to determine under what circumstances the information should be filed. And in **State v. Pirkey**, 281 P. 2d 698 (Or. 1954), a statute which delegated to a grand jury or a magistrate power to determine in advance whether to charge a defendant with a felony or a misdemeanor for the same offense without fixing a standard for the exercise of that discretion was held to violate the equal protection clause of the state and federal constitution and an indictment drawn pursuant to such statute was dismissed.

Such constitutional problems as are raised by the Government's positron disappear when it is seen that proper instructions to the jury, leaving to its wisdom the gravity of the offense (whether felony or misdemeanor), can readily be given under Rule 31 (c). Whether or not the tax evasion motive played a part (and, if so, how much) in such an aggravated attempt as keeping a double set of books, or making false entries and alterations, or such other affirmative attempts as are illustrated in **Spies v. United States**, 317 U. S., l. c. 499, so as to justify a conviction for a felony is for the jury to determine; whether or not the tax-evasion motive, although present, was subsidiary to some other reason for conduct intended to mislead and conceal—and thus less aggravated from the tax standpoint—so as to justify the lesser misdemeanor conviction is equally for the jury to determine. Thus far, the Government has recognized that there exists some line of gradation between the two offenses and has assumed unto itself the knowledge of the formula for the quantum of

gravity required to proceed under either of the two statutes; in its Brief in Opposition, **Dillon v. United States**, fn. 3, p. 9, the Government advises us of its policy of proceeding against "minor" offenders under Section 3616 (a), leaving the inference that Section 145 (b) has been reserved for "major" offenders. Whether an offender is "major" or "minor" is a proper jury question, it seems, better judged in terms of wilfulness than in dollars and cents and the size of the taxpayer's deficiency.

Even under the Government's theory that no lesser offense instruction can be given unless the lesser offense is necessarily included in the statutory definition of the crime for which defendant is indicted, petitioner was still entitled to such an instruction. The phrase "in any manner", as used in Section 145 (b), is not employed in a vacuum but has to be considered in relationship to the entire tax structure and the possible methods of tax evasion. It is not without limitation.[7] In a tax-collecting system which, despite use of the withholding device, continues to rely "largely upon the taxpayer's own disclosures" (**Spies v. United States**, supra, at 495; see also **United States v. Murdock**, 290 U. S. 389, 395-396), the most obvious "manner" in which evasion or defeat is likely to be attempted is a false statement to the Treasury of the facts upon which the tax is based. This plain fact is highlighted in this Court's **Spies** opinion by the examples given (317 U. S., at 499):

> "Congress did not define or limit the method by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished 'in

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[7] In *United States v. Norvick*, 273 U. S. 202, it was held not to be so comprehensive as to impliedly repeal, as to false returns, the general perjury statute.

any manner'. By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind and **any conduct, the likely effect of which would be to mislead or to conceal.** If the tax evasion motive plays any part in such conduct the offense may be made out.'' (Emphasis supplied.)

Spies illustrates the variety of conduct from which a violation of Section 145 (b) might be inferred. Ultimately, in each of these illustrations, the essence of the wrongful attempt lies in misrepresentations of fact to the taxing officials. Thus, ''keeping a double set of books, making false entries or alterations, or false invoices or documents'' would not fall under Section 145 (b) were their purpose anything other than "to mislead or to conceal" the tax-collecting authorities.

Section 3616 (a)[8] forbids not only the delivery of ''any false or fraudulent lists, return, account or statement,'' but also proscribes against the disclosure of such items. Since every reported tax evasion case either contains a false statement or false disclosure to a Government representative, the language of Section 3616 is as broad in fact as Section 145 (b).

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[8] Under Section 38 Eighth of the Corporation Excise Tax Act of 1909 (36 Stat. 11, 117) and Section 11 F of the Income Tax Act of 1913 (38 Stat. 114, 171), it was an offense to make "any false or fraudulent return, or statement, with intent to defeat or evade the assessment * * *." Similar provisions appeared in Section 18 of the Revenue Act of 1916 (39 Stat. 756, 775) and Section 1209 of the Revenue Act of 1917 (40 Stat. 300, 336). Section 253 of the Revenue Act of 1918 (40 Stat. 1057, 1085), introducing the language now found in Section 145 (b), declared that anyone "who

The fact that convictions were sustained in **United States v. Smith**, 3 Cir., 214 F. 2d 887, and **United States v. Kafes**, 3 Cir., 206 F. 2d 905, where the taxpayer did not file any return, does not make Section 145 (b) broader in scope than Section 3616 (a). In the **Spies** case this Court held that the willful attempt to evade Section 145 (b) could not be established by mere proof of failure to file a return or pay a tax, but that some willful commission was necessary. This willful commission is either a false return or a false statement or disclosure with intent to deceive. Such is the essence of this offense and such acts of commission were present in both **Smith** and **Kafes**. The defendant in the **Kafes** case did not keep proper books of account and therefore one can infer that he disclosed a false account to a Government representative in violation of Section 3616 (a). And in the **Smith** case defendant made false representations to revenue agents and altered his records which undoubtedly led to a false disclosure. These two cases mean that a taxpayer who fails to file a return is not immune from a tax evasion prosecution if he makes false disclosures to agents with intent to defeat taxes. Furthermore, it seems clear that "no return" cases are equally violative of Section 145 (b) and Section 3616 (a) and that Section 145 (b) is not broader on this ground. One may fail to file a return and disclose false information in explanation thereof which would put him in violation of Section 3616 (a) so that a narrower interpretation of Section 3616 (a) on this ground appears unfounded.

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willfully attempts in any manner to defeat or evade the (income) tax imposed by this title, shall be guilty of a misdemeanor * * *." See also Section 1308 (b) of the same Act, 40 Stat. 1143. This provision was re-enacted in the Revenue Act of 1921, Section 253 (42 Stat. 227, 268). In 1924, the provision was enacted as Section 1017 (b) of the Revenue Act of 1924 (43 Stat. 253, 344) as a felony in the language now found in Section 145 (b) of the Code, and was carried forward in subsequent Acts and into the Code. 44 Stat. 9, 116; 45 Stat. 791, 835; 47 Stat. 169, 217; 48 Stat. 680, 725; 49 Stat. 1648, 1703; 52 Stat. 447, 513; 53 Stat. 1, 63.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

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IN THE

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OCTOBER TERM, 1955.

No. 60.

LOUIS BERRA,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

Argument

Petitioner's basic objection to the Government's position is the underlying assumption throughout its brief that the only statutory section invoked by the indictment is Section 145 (b) and that, therefore, this confers a pre-emptive-like status on this section against which all subsequent reasoning, argument and authority must be measured. Presumably this stems from the fact that Section 145 (b) was endorsed on the indictment and no other statutory sections

were mentioned therein. In essence, it is the Government's position that petitioner must justify his right to a lesser offense instruction under Section 3616 in the face of the clear intent of the indictment that he be tried under Section 145 (b). On the other hand, petitioner contends that, in view of the Government's concession that both crimes are charged in the indictment, there is no more warrant for assuming that only Section 145 (b) is invoked than there is for assuming that only Section 3616 is invoked. If any statute is invoked, then it is both statutes, for it is the indictment itself which informs a defendant of the charges against which he must defend and not a recitation of the statute. **Williams v. United States,** 168 U. S. 382. The recitation of a statute does not add to or weaken the legal effect of the charging allegations; the pleader's designation of a statute purporting to support the charge is immaterial, since the charge, though not sustained by that statute, may come within the terms of another. **United States v. Hutcheson,** 312 U. S. 219; **United States v. Lynch,** 7 Cir., 180 F. 2d 696. The Government seeks to weaken its concession that both offenses are charged in the indictment and seeks to overlook the lesser offense charged because of this statutory recitation. To do so, it is submitted, would be to make such recitation material and to add something to the legal effect of the indictment contrary to the established authority of this Court. **Williams v. United States,** supra; **United States v. Hutcheson,** supra. It is perhaps because of this underlying assumption that the Government in its brief has chosen to leave unanswered the contention and authorities in petitioner's brief that he is entitled to the lesser offense instruction, not because there exists a particular gradation of offenses between Section 145 (b) and Section 3616 element for element, but simply because the latter offense is as fully charged as is the former.

In its brief the Government tells us that it had a perfect right to elect to prosecute for the felony to the exclusion

of the misdemeanor for, "where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law," citing cases (Brief, p. 30). There is also a concession (Brief, fn. 13, p. 30) that, because each of the two offenses does not require the proof of a fact not essential to the other, the Government could not prosecute petitioner under both for filing a false income tax return. In short, the Government contends for the proposition that, where there are two statutes (one a felony and the other a misdemeanor) proscribing the same course of private conduct and requiring the same proof so that double jeopardy attaches to both, the Government in its discretion can choose to prosecute for either. Petitioner submits that neither reason nor authority supports the Government's position.

In the first place, the Government's position means that there is delegated to the United States Attorney or to the grand jury the arbitrary power to charge defendants with felonies or misdemeanors without any fixed standard for the exercise of such a power. If each of the two offenses does not require proof of even a single fact not essential to the other, then what shall we say is the standard in determining who shall be felons and who shall be misdemeanants? There would be no rational basis for the differences in range of punishment. Having rejected petitioner's diffident suggestion that the distinction between the offenses may be in the quantum of the tax evasion intent, the Government argues (Brief, p. 30) that there was no rational basis for the petit jury to have distinguished between the two offenses. If this be so, then what rational basis could there be to guide a United States Attorney or a grand jury in determining under which statute to indict? To give the Government the election here contended for would reduce the indictment of tax defendants to mere caprice—whether of the United States Attorney, the Department of Justice, or the grand jury would seem unim-

portant under our constitutional form of government. See **Rosenberg v. United States**, dissenting opinion by Mr. Justice Frankfurter, 346 U. S., l. c. 306.

In the second place, petitioner submits that the cases relied on by the Government do not support the election here urged where the proof under each statute (the felony and the misdemeanor) requires exactly the same facts. According to petitioner's understanding of these cases, the Government is given the right to choose between offenses when each requires the proof of a fact not essential to the other and double jeopardy does not attach so as to immunize the particular defendant from further prosecution for the same criminal act. It seems clear that Mr. Justice Clark's opinion in **Rosenberg v. United States**, supra, relied upon by the Government (Brief, p. 30), limits (in his next sentence following the one quoted) the election to situations where different proof is required for each offense, unlike the instant case. Such also is the import of **United States v. Beacon Brass Co.**, 344 U. S. 43 (where proof that the false statements were made in a wilful effort to evade taxes is necessary under Section 145 (b) unlike the mere making of a false statement under 18 U. S. C., Section 80), and **United States v. Noveck**, 273 U. S. 202 (where proof of the presentation of a false affidavit is necessary to constitute an attempt to evade the tax law unlike the mere making of a false affidavit for perjury). Similarly, in **United States v. Gilliland**, 312 U. S. 86, where the Government's choice of statute was approved, it is seen that different proof was required for each of the offenses involved. Under the felony statute, 18 U. S. C., Section 80, the proof required was the mere making of a false affidavit by anyone in any matter within the jurisdiction of any department or agency of the United States; on the other hand, under the Connally "Hot Oil" Act of 1935, the proof required that the false affidavit be made by the person required to file same on monthly report forms approved by the

Secretary of the Interior in violation of a regulation duly prescribed by the President. Petitioner has no quarrel with this case, for it is consistent with those giving the Government a choice as to which statute should be invoked, where different proof is required for each offense. This is not true in the instant case, the Government having already conceded that each offense does not require the proof of a fact not essential to the other (Brief, fn. 13, p. 30).

Indicative of the pre-emptive status accorded Section 145 (b) by the Government, it is charged that petitioner in effect seeks to repeal Section 145 (b) by implication. If it would help this Court any in resolving the problem before it, petitioner would similarly point the accusing finger and argue that the Government's position seeks to repeal by implication Section 3616. However, such labels, it is submitted, only obscure the basic issues. "These considerations—the fact that Congress and not the whim of the prosecutor fixes sentences, that the allegations of an indictment are to be judged by the relevant statute under which punishment may be meted out and not by the design of the prosecutor or the assumption of the trial court—cut across all the talk about repeal by implication and other empty generalities on statutory construction." **Rosenberg v. United States**, supra, l. c. 306, 307, dissent by Mr. Justice Frankfurter.

Finally, the Government urges as an alternate ground supporting the trial judge's refusal to give the misdemeanor instruction its patent inadequacy. It is said that the instruction failed to advise the jury under what state of the evidence it should consider whether petitioner had violated Section 3616 (a) and what aggravating element or elements are required for the felony but not the misdemeanor. In view of the fact that the indictment charged the crime and the evidence adduced admittedly would support a conviction under Section 3616 (a), whether or not

the presence or absence of aggravating elements is ultimately determined to be the distinction between the two, petitioner submits that a delineation of standards was not needed. It need have been given only under the Government's gradation theory of the lesser included offense which assumes that a felony under Section 145 (b) was the only offense charged; under petitioner's view that a lesser and other offense was also charged and supported by the evidence he was entitled to the instruction independently of any other offense, such as a 145 (b) violation, also charged. As a matter of fact, any failure to submit in the misdemeanor instruction elements distinguishing it from the "greater included" offense—the felony—could only have prejudiced petitioner and have been error against him about which he cannot and does not presently complain. Thus, by not educating the jury concerning the differences between the two in that part of the trial judge's charge dealing with the felony, the petitioner took the risk that he might be convicted of a felony by a jury which did not factually find the necessary aggravated elements, if such be the difference. In this manner the petitioner upon being convicted of a felony waived his right to object that the jury had been improperly instructed on the elements thereof, but it does not follow, as the Government contends, that his failure so to preserve his objection to that part of the charge defining the felony renders inadequate a requested and separate instruction that under the evidence a misdemeanor also has been committed of which the jury may find petitioner guilty.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1954

LOUIS BERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
H. BRIAN HOLLAND,
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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 766

LOUIS BERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (Pet. 29-42) has not been reported.

JURISDICTION

The judgments of the Court of Appeals (Pet. 44-45) were entered on April 22, 1955. The petition for certiorari was filed on May 2, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial by a witness's inadvertent reference to a prior arrest.

2. Whether the trial court should have instructed the jury that petitioner, who had been indicted for the felony of attempted evasion of income taxes, could be convicted of the misdemeanor of filing a false return with intent to defeat the assessment.

3. Whether petitioner's unreported illicit receipts were taxable income.

4. Whether the trial court erred in the admission, for purposes of impeachment, of petitioner's prior claim of the privilege against self-incrimination before a grand jury.

5. Whether the trial court abused its discretion by conditioning petitioner's probation on his not being employed by any labor organization.

STATUTES AND RULES INVOLVED

The pertinent portions of 18 U.S.C. 1503 and 3651, Internal Revenue Code of 1939 Sections 145 (b) and 3616, and Federal Rules of Criminal Procedure 31(c) and 32(e) are set forth in the Appendix, *infra*, pp. 11-15.

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of Missouri on two counts charging him with corruptly endeavoring to obstruct justice by requesting the

destruction of certain records and by influencing a witness, in violation of 18 U.S.C. 1503 (R. 1-5). On May 28, 1954, petitioner was indicted on three counts of wilful attempt to evade income taxes by filing fraudulent returns in violation of Section 145(b) of the Internal Revenue Code of 1939 (R. 5-7). The amounts of income and the taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

		Reported		Corrected	
		Income	Tax	Income	Tax
Count I	(1951)	$5,177.22	$566.54	$8,669.88	$1,324.42
Count II	(1952)	5,514.50	691.42	7,464.50	1,149.86
Count III	(1953)	5,293.34	775.52	6,193.34	984.76

The two cases were consolidated for trial. After a jury trial petitioner was found guilty as charged (R. 221-222). Petitioner was sentenced to imprisonment for a period of four years on each of the three counts charging tax evasion, all terms to run concurrently (R. 235-236). On each of the two counts charging obstruction of justice, sentence was suspended and the petitioner was placed on probation for a period of five years, to commence upon completion of the term of imprisonment. Probation was granted upon the condition that petitioner not be employed by any labor organization. (R. 233-234.) The Court of Appeals reversed the judgment of conviction on one of the counts charging obstruction of justice and affirmed the judgments on the other counts of that indictment and the tax evasion charges (Pet. 29-42).

The evidence to support the verdicts may be summarized as follows:

During the years 1951, 1952 and 1953, petitioner was the business manager [1] of the St. Louis Labor Health Institute, a non-profit organization furnishing free medical aid to members of Teamsters' Local 688, American Federation of Labor, and their families. Petitioner was authorized to approve bills and sign checks. The counter-signature of another employee was also required. (R. 52, 55, 120, 128, 153.) Petitioner was not authorized to cash or endorse checks (R. 143).

One John F. Schmidt did painting work for Labor Health Institute. At petitioner's request Schmidt billed Labor Health Institute in amounts which overstated the cost of labor. Schmidt was paid these padded amounts by checks drawn on Labor Health Institute's bank account and counter-signed by petitioner. By checks drawn on his own bank account, Schmidt then paid to petitioner the amounts of the overpayments. Schmidt deducted these overpayments on his income tax returns. Over the three years involved these payments to petitioner amounted to some $5,000. Also, approximately $4,000 to $4,500 worth of work at petitioner's home done by Schmidt and by Shulman and Sons Contracting Company was billed to and paid by the Labor Health Institute. (R. 54-56,

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[1] Although petitioner was officially business manager only until September, 1952, he performed the same duties for the remainder of 1952 and 1953 (R. 52).

67-73, 89.) Petitioner did not report these amounts on his income tax returns (R. 49-51, 108-120).

After an investigation of Labor Health Institute's records was commenced, petitioner contacted Schmidt at various times and sought to persuade him to destroy his records. Petitioner also urged Schmidt, in the event he was called before the grand jury, to testify that the payments were loans. (R. 48-49, 74-75, 77-78, 104-106.)

ARGUMENT

1. In response to a question as to when petitioner asked Schmidt to destroy certain records, Schmidt testified on direct examination that "* * * after Mr. Berra was arrested, why he called me up * * *." (R. 73.) It then developed that the arrest had no connection with this case. The reference to the arrest was unsolicited and was made only to fix the time of an event. It was not brought out for the purpose of reflecting upon the petitioner's reputation or character, but was purely incidental to Schmidt's testimony relating to the time of his conversations with petitioner. See *Means* v. *United States*, 65 F. 2d 206 (C.A. D.C.). We think the two courts below correctly concluded that this completely colorless testimony could have had no effect on the jury, and was simply the sort of immaterial incident that sometimes occurs during a trial. The request for a mistrial was properly denied.

Petitioner relies entirely upon *United States* v. *James*, 208 F. 2d 124 (C.A. 2d), and *Michelson* v.

United States, 335 U.S. 469. The *James* case involved testimony as to a prior arrest of defendant given by a Government narcotics officer, a witness who, as the court below pointed out (Pet. 37), "it may be assumed, was more familiar with courtroom rules of evidence than was witness Schmidt in the present case." The *Michelson* case involved the propriety of a question put by the prosecutor specifically calling for information about an arrest some twenty years before the trial, and this Court held that under the facts of that case it was not prejudicial error to permit the question. In the instant case there is merely a chance remark not sought by the prosecutor.

2. Petitioner challenges (Pet. 14-15) the trial court's refusal to charge the jury that petitioner could be found guilty of the lesser offense of making a false return with intent to defeat the assessment, in violation of Section 3616(a) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 14). This raises the same issue as is presented in *Dillon* v. *United States*, 218 F. 2d 97 (C.A. 8th), certiorari granted April 25, 1955, No. 629, October Term, 1954. Accordingly, the Government does not oppose the granting of a writ of certiorari on this issue.

3. Petitioner contends (Pet. 15-24) that the funds in question represented the proceeds of embezzlements from the Institute and therefore, under *Commissioner* v. *Wilcox*, 327 U.S. 404, did not constitute income taxable to him. Whatever

vitality that case may now have,[2] it is plainly inapplicable here because the funds were not embezzled. Petitioner was not in possession of the funds before the wrongful taking for they resided in the Institute bank account and he could not get possession without the counter-signature of another employee. That signature was obtained upon the presentation of false invoices. Petitioner's conduct, therefore, did not amount to embezzlement (*State* v. *Harrison*, 347 Mo. 1230) but did constitute swindling or obtaining money by false pretenses (*Rollinger* v. *United States*, 208 F. 2d 109 (C.A. 8th)), the proceeds of which are taxable to him as income (*Rutkin* v. *United States*, 343 U.S. 130; *Briggs* v. *United States*, 214 F. 2d 699 (C.A. 4th), certiorari denied, 348 U.S. 864; *Marienfeld* v. *United States*, 214 F. 2d 632 (C.A. 8th), certiorari denied, 348 U.S. 865).

Assuming *arguendo* that the funds were embezzled, petitioner's argument that they were not income to him still fails, for the proper test of whether unlawful gains constitute income has been set forth by this Court in *Rutkin* v. *United States*, *supra*, as follows (343 U.S. at 137):

> An unlawful gain, as well as a lawful one, constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic

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[2] In *Rutkin* v. *United States*, 343 U.S. 130, 138, this Court, speaking of the *Wilcox* case, *supra*, said, "We limit that case to its facts."

value from it. *Burnet* v. *Wells*, 289 U.S. 670, 678; *Corless* v. *Bowers*, 281 U.S. 376, 378. That occurs when cash, as here, is delivered by its owner to the taxpayer in a manner which allows the recipient freedom to dispose of it at will, even though it may have been obtained by fraud and his freedom to use it may be assailable by someone with a better title to it.

4. On direct examination petitioner testified that he kept a record of all the "loans" from Schmidt and that he had no reason to hide anything. (R. 147, 150-152.) For the purpose of impeachment (R. 167) the trial court admitted evidence of petitioner's prior grand jury testimony wherein he refused to answer questions regarding transactions with Schmidt on the grounds that such answers might tend to incriminate him. Petitioner asserts (Pet. 25-27) this was an impairment of his privilege and that the trial court erred in refusing to instruct the jury that it might not consider the claim of privilege in determining petitioner's guilt.

The rule is that a defendant who takes the stand in his own behalf waives completely his privilege. In *Raffel* v. *United States*, 271 U. S. 494, this Court upheld questions asked of a defendant at a second trial as to why he had not taken the stand at the first trial. The Court stated at p. 499:

> The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not

> for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness.

See also *Viereck* v. *United States*, 139 F. 2d 847 (C.A. D.C.), certiorari denied, 321 U.S. 794; *United States* v. *Klinger*, 136 F. 2d 677 (C.A. 2d), certiorari denied, 320 U.S. 746; *United States* v. *Gottfried*, 165 F. 2d 360, 367 (C.A. 2d), certiorari denied, 333 U.S. 860, rehearing denied, 333 U.S. 883, all of which are on all fours with the holding of the court below. It was not error to refuse the requested instruction since the trial court had made it clear during the trial that the evidence was being admitted to contradict petitioner's position taken on the witness stand.

5. Petitioner contends (Pet. 27) that there is no reasonable relationship between his conviction for obstruction of justice and the condition of probation that he not be employed by a labor organization. The argument ignores the facts of the case and the purpose of probation to serve "the ends of justice and the best interest of the public as well as the defendant." (18 U.S.C. 3651; Appendix, *infra*, pp. 12-13.) The Court of Appeals for the Ninth Circuit considered a similar objection to a probationary condition forbidding convicted defendants from being employed as stewards on railroads and found the claim of error "obviously frivolous and its consideration a waste of the time and energy of this court". *Stone* v.

United States, 153 F. 2d 331, 333. Clearly there was no abuse of discretion here.

CONCLUSION

Since a writ of certiorari has been granted in *Dillon* v. *United States*, *supra*, to determine whether the rule of lesser offenses applies to wilful attempt to evade taxes, and the same issue is involved in this case, to this extent the Government does not oppose the petition. It is submitted that no other question warranting review is presented and that on all other issues the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JUNE, 1955

APPENDIX

18 U.S.C.:

SEC. 1503. *Influencing or injuring officer, juror or witness generally*

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influ-

show a violation of the latter.[13] "Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law * * *." *Rosenberg* v. *United States*, 346 U. S. 273, 294 (opinion of Clark, J.); *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45; *United States* v. *Gilliland*, 312 U. S. 86, 95–96; *Blockburger* v. *United States*, 284 U. S. 299, 304; *United States* v. *Noveck*, 273 U. S. 202, 206–207; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Hammer* v. *United States*, 271 U. S. 620, 625; *Gavieres* v. *United States*, 220 U. S. 338, 342. In such a situation the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor.[14] *United States* v. *Noveck*, *supra*;

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[13] There is no question of double jeopardy here, since the Government has not attempted to prosecute petitioner under both statutes. If it had so attempted, the question would depend on whether each offense "requires the proof of a fact not essential to the other." *Pereira* v. *United States*, 347 U. S. 1, 9, and cases cited. We think it clear that under that test the Government could not prosecute petitioner under both Section 145 (b) and Section 3616 (a) for filing a false income tax return with intent to evade the tax.

[14] It cannot be suggested that petitioner's indictment for a felony rather than for a misdemeanor was at the mere whim of the United States Attorney. The latter acted under the supervision of the Department of Justice; and in any event the actual accusation was made, not by the prosecuting officers of the Government, but by the grand jury, which had the power and the duty to return an indictment for any alleged crime within its jurisdiction, and to specify the particular statute which the defendant is charged with having violated. Rule 7 (c); *Sullivan* v. *United States*, 348 U. S. 170, 173, and cases cited. "The Constitution itself makes

United States v. *Gilliland, supra;* cf. *General Motors Corp.* v. *United States,* 286 U. S. 49, 56.

The fact that prosecution under the felony statute increases the maximum possible punishment is of no significance. "The matter of penalties lay within the discretion of Congress. Section 35 covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations." *United States* v. *Gilliland, supra,* at 95. The question of punishment is for the trial court, not the jury, to determine. Thus, in the instant case the trial court, notwithstanding that the conviction was for a felony, certainly could have imposed sentence of substantially less than the 4

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the grand jury, a part of the judicial process. It must initiate prosecution for the most important federal crimes. * * The proceeding before a grand jury constitutes 'a judicial inquiry', *Hale* v. *Henkel,* 201 U. S. 43, 66, of the most ancient lineage." *Cobbledick* v. *United States,* 309 U. S. 323, 327. In performing their statutory duty to "prosecute for all offenses against the United States" under the supervision of the Attorney General (28 U. S. C. 507), United States Attorneys have a high degree of discretion as to what matters shall be presented to the grand jury, including the initial choice (which the grand jury is, of course, free to accept or reject) of the statute under which a criminal prosecution is to be brought, *Hale* v. *Henkel, supra; United States* v. *Thompson,* 251 U. S. 407; *Confiscation Cases,* 7 Wall. 454, 457; *Deutsch* v. *Aderhold,* 80 F. 2d 677, 678 (C. A. 5); *District of Columbia* v. *Buckley,* 128 F. 2d 17, 20–21 (C. A. D. C.); *Clemons* v. *United States,* 137 F. 2d 302, 305 (C. A. 4); *United States* v. *Brokaw,* 60 F. Supp. 100 (S. D. Ill.); *Howell* v. *Brown,* 85 F. Supp. 537, 539–540 (D. Neb.); *United States* v. *Lange,* 128 F. Supp. 797, 799 (S. D. N. Y.).

years' imprisonment actually imposed, had it considered a milder sentence to be justified by "the circumstances and gravity" of petitioner's violations.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment should be affirmed.

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FEBRUARY 1956.

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SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 60.

LOUIS BERRA,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

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UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

Pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, petitioner in the above-captioned cause, requests the Court to broaden the scope of review previously granted in its order of December 5, 1955, to include Question Number 3, involving the taxability of misappropriated funds. For his grounds, petitioner calls to the Court's attention the decision of the

United States Court of Appeals for the Sixth Circuit in **Davis v. United States**, Par. 73007 P-H Fed., 1955, decided on October 13, 1955, subsequent to the filing of petitioner's Supplemental Brief herein. This case once again demonstrates the importance to the administration of the revenue laws of the need for some definitive principles clarifying the proper application of the **Wilcox** and **Rutkin** cases. In this case the Sixth Circuit, without so much as the citation of the **Wilcox** case and relying on the **Rutkin** case, distinguishes the **Wilcox** rationale on the bases that the funds, as in the instant case, were obtained by fraud and the alleged embezzlement was by a stockholder from his wholly-owned corporation. In doing so, it cited the Third Circuit case of **Kann v. Commissioner**, 210 F. 2d 417, which is contrary to a later decision of the Second Circuit in **Estate of Jacob J. Dix v. Commissioner of Internal Revenue**, 223 F. 2d 436, certiorari denied No. 363, this Term. Therefore, while not contrary to the instant case, the intervening decision of the Sixth Circuit in the **Davis** case, it is submitted, re-emphasizes the need for review previously expressed by petitioner and by the Solicitor General in his petition for certiorari in the **Dix** case, No. 363, this Term. Whatever this Court's ultimate treatment, such clarification or, perhaps, enlightenment of taxpayers and the Commissioner, if that be the more accurate expression, is being earnestly requested by all parties concerned with the proper administration of old Section 22 (a) of the Revenue Code of 1939 and its successor Section 61 (a) of the Revenue Code of 1954. The meaning and import of the **Rutkin** case (as applied in the **Davis** case), petitioner is advised, will be raised by counsel for Davis in a petition for certiorari to be filed in this Court on or before December 10, 1955. Such a petition for certiorari will provide this Court with full range and opportunity to lay down controlling principles involving the includibility of misappropriated funds in three dissimilar, but closely related factual situations:

(1) where the employee misappropriating the funds is not a stockholder of the employer corporation and the availability of corporate surplus for the distribution of dividends could not affect taxability, **Berra v. United States**, No. 60, this Term;

(2) where the employee misappropriating the funds of the employer corporation is the equitable owner of a substantial stock interest in the employer corporation and the available corporate surplus for dividends could affect taxability, **Estate of Dix v. Commissioner of Internal Revenue**, No. 363, this Term;

(3) where the employee misappropriating the funds of the employer corporation is the sole owner of the stock in the employer corporation and the available corporate surplus for dividends could affect taxability, **Davis v. United States**, No. ...., this Term (to be filed on or before December 10, 1955).

For the foregoing reasons, petitioner requests the Court to withhold its consideration of this petition for rehearing until it has fully considered the petition for certiorari to be filed in **Davis v. United States**, supra, so that the Court may, if it deems proper, broaden the scope of review to include Question Number 3 as requested herein, vacate its earlier order denying certiorari and grant same in the **Dix** case, No. 363, this Term, and grant certiorari to petitioner Davis on the instant question.

Respectfully submitted,

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islature has defined two distinct offenses, but one offense requires proof of all the facts or elements necessary to establish the other, plus something more—in other words, a greater offense including a lesser." *Ekberg* v. *United States*, 167 F. 2d 380, 385 (C. A. 1). The basic principle to be extracted from the countless cases on the subject, which are mainly in the state courts, is that a "lesser included offense" instruction is required where there exists a gradation of offenses, in which the greater offense alleged contains the same elements plus some aggravating ingredient not found in the lesser included offense, and where the evidence permits the jury to find the defendant not guilty of the greater offense but guilty of the lesser. See 1 Wharton, *Criminal Law* (12th ed., 1932), Section 33. The rule was applied as a matter of common law by this Court in 1857, *Dynes* v. *Hoover*, 20 How. 65, 79–80, and in 1872 Congress gave the rule statutory sanction:

> "That in all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offence so charged; *Provided*, That such attempt be itself a separate offense."

Act of June 1, 1872, Sec. 9, c. 255, 17 Stat. 196. This provision was incorporated into the Revised Statutes of 1874 as Section 1035, and appeared in the 1934, 1940 and 1946 edi-

In the 1890's this Court decided four cases applying the "included offense" doctrine. These cases lay down three basic principles which are applicable here:

(1) The only object of the rule is to enable the jury, if it does not find defendant guilty of the crime charged and if the evidence permits it to do so, to find him guilty of a lesser offense necessarily included in the one charged. *Sparf and Hansen* v. *United States*, 156 U. S. 51, 63.

(2) Since it is for the jury to decide what the evidence proves, a requested instruction as to a lesser included offense or offenses must be given if there is any reasonable view of the evidence under which the jury might properly conclude that the defendant committed only a lesser degree of the crime charged. *Stevenson* v. *United States*, 162 U. S. 313, 314–316, 321–323.

(3) If there is no evidence showing that a lesser crime was committed by the defendant, the instruction should not be given for it would result only in confusing the jury. *Davis* v. *United States*, 165 U. S. 373, 378–379; *Andersen* v. *United States*, 170 U. S. 481, 510–511.

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tions of the United States Code as 18 U. S. C., Section 565, the only change in language being the substitution of the word "if" for the words "Provided, that." The provisions now exist in substantially similar form as Rule 31 (c) of the Federal Rules of Criminal Procedure. (*Supra*, p. 4.) The notes of the Advisory Committee state that Rule 31 (c) "is a restatement of existing law."

The following are a few familiar illustrations of application of the "included offense" doctrine. A defendant charged with murder may be convicted of manslaughter if the jury finds an absence of malice (*Stevenson* v. *United States,* 162 U. S. 313, 315–316, 321–323). A defendant charged with robbery may be found guilty of larceny, for robbery is aggravated larceny (*Lamore* v. *United States,* 136 F. 2d 766 (C. A. D. C.)). An indictment for burglary supports a conviction for larceny where the jury is not satisfied as to the breaking and entering in the nighttime (*United States* v. *Dixon,* 25 Fed. Cas. No. 14,968 (C. C. D. C.)). A defendant indicted for adultery may be convicted of fornication where the evidence showed that he was unmarried (*Respublica* v. *Roberts,* 2 Dall. 124 (Pa.)). A defendant charged with assault and battery with intent to kill may be convicted of an assault and battery only, "if the jury are satisfied that he was not guilty of the felonious intention" (*Ex parte Robinson,* 10 D. C. 418, 419).

Clearly Rule 31 (c) has no application here. This is not a case where the indictment charges a "greater" offense, *e. g.,* murder, and the proof would permit the jury to convict the defendant of a "lesser" offense, e. g., manslaughter, which contains some but not all of the elements of the offense charged. Whether an offense is "necessarily included" in another depends on a comparison of the substantive elements of the two

offenses, and not on a difference in the penalties prescribed. The lesser included offense must be, in substance, a "lower grade" of the offense charged. *Stevenson* v. *United States*, 162 U. S. 313, 315.

One offense is not "necessarily included" in another merely because, as in this case, the proof against the defendant would support his conviction of either offense. There is no aggravating ingredient to be found among the elements of Section 145 (b) which is not also found in Section 3616 (a). There being no element of aggravation which is present in "the offense charged" but absent in a violation of Section 3616 (a), the latter is clearly not a "lower grade" of the former. Nor can there be any reasonable view of the evidence under which the jury could properly find that petitioner did not wilfully attempt to evade or defeat the tax in the manner alleged in the indictment, i. e., by filing a false and fraudulent return (Section 145 (b)), but that he did file a false or fraudulent return "with intent to defeat or evade the * * * assessment" (Section 3616 (a)).[8]

[8] Obviously, the word "assessment" as used in Section 3616 (a) is equivalent to the word "tax." *United States* v. *Gold*, 53 F. Supp. 848 (D. N. J.). See Section 3612 (f) of the 1939 Code (53 Stat. 438), which provides that "The Commissioner shall determine and assess all taxes, other than stamp taxes," in cases where a taxpayer fails to file a return or files a false or fraudulent return. In such cases the Commissioner in effect files a substitute return (Sec. 3612 (a), (b)).

Petitioner concedes (Br. 11) that "anyone who delivers or discloses a false or fraudulent return 'with intent to defeat or evade the * * * assessment' is attempting to defeat and evade his taxes." He argues, however (Br. 19–20), that the aggravating ingredient present in the felony and lacking in the misdemeanor may be a greater "quantum of gravity," and that "[w]hether an offender is 'major' or 'minor' is a proper jury question * * *."

But we can think of no instruction that would guide a jury in distinguishing between the "quantum of gravity" required to make out one offense and not the other, and certainly petitioner's requested instruction made no attempt to do so. Nor do the statutes lay down any dividing line between the two offenses with respect to the degree of wilfullness required. Petitioner's suggestion merely emphasizes the complete absence of any rational basis upon which the jury could find as a fact that he did not violate Section 145 (b) but did violate Section 3616 (a).

Thus, an independent ground justifying the trial court's refusal to give the requested instruction is that it was patently inadequate. The one proposed by petitioner was incomplete and erroneous in that it did not purport to advise the jury (1) under what state of the evidence it should consider whether petitioner had violated

Section 3616 (a); and (2) what standards should be used in distinguishing between the two offenses, *i. e.*, what aggravating element or elements are required for the felony but not the misdemeanor. It is well settled that, where a "lesser included offense" instruction is given, the jury is directed to determine first whether the defendant is guilty of the offense charged in the indictment, and if it finds that he is not, or if it has a reasonable doubt as to whether the aggravating ingredient has been proved, then and only then should it inquire into whether he is guilty of the lesser offense. *McAffee* v. *United States*, 105 F. 2d 21, 31 (C. A. D. C.); *Goodall* v. *United States*, 180 F. 2d 397, 400 (C. A. D. C.); *Marcus* v. *United States*, 86 F. 2d 854, 859 (C. A. D. C.); *Sekinoff* v. *United States*, 283 Fed. 38, 40 (C. A. 9); *Ex parte Robinson*, 10 D. C. 418, 419; *United States* v. *Meagher*, 37 Fed. 875, 880 (C. C. W. D. Texas). Cf. *Ekberg* v. *United States*, 167 F. 2d 380 (C. A. 1).[6] This is also the rule generally followed throughout the state courts.[7]

In the present case, there was no such issue of fact which could properly be left to the jury.

[6] In the *Elkberg* case the greater and the lesser included offenses were set out as separate counts of the indictment. The court held (167 F. 2d, pp. 385–386) that the conviction on a general plea of guilty could stand but that the punishment could not exceed that provided for the greater offense.

[7] *Dillon* v. *State*, 137 Wis. 655, 667–668; *Commonwealth* v. *Chavis*, 357 Pa. 158; *State* v. *Mele*, 140 Conn. 398; *Thoreson* v. *State*, 69 Okl. Cr. 128; *State* v. *Louther*, 22 Wash. 2d

Upon what basis of *fact* could it possibly choose as between a violation of Section 145 (b) or of Section 3616 (a)? If the acts alleged in the indictment had been proved, petitioner was guilty under both statutes. If they had not been proved, he was not guilty under either. Under the indictment in this case (which is typical of almost every Section 145 (b) prosecution), charging evasion of income tax by filing a false return, there was no ingredient of the Section 145 (b) offense which was not also required for conviction under Section 3616 (a).[8]

3. PETITIONER'S ARGUMENT, IF ACCEPTED, WOULD IN EFFECT REPEAL SECTION 145 (b) AS APPLIED TO FILING FALSE RETURNS WITH INTENT TO EVADE THE TAX

The simple and dominant fact in this case is that Sections 145 (b) and 3616 (a) overlap, and in an area within which the facts of this case fall. Section 145 (b) makes it a felony to attempt wilfully "in any manner to evade or defeat" the income tax. In the overwhelming majority of cases prosecuted under Section 145 (b),

497; *Kimball* v. *State*, 63 Ga. App. 183; *Sewell* v. *Commonwealth*, 284 Ky. 183; *State* v. *Young*, 314 Mo. 612, 630; *State* v. *Endorf*, 219 Iowa 1321; *Koehler* v. *State*, 188 Ind. 387.

[8] This would not be true, of course, in those rare cases under Section 145 (b) where the alleged manner of evasion does not take the form of filing a false return. *E. g.*, *United States* v. *Smith*, 206 F. 2d 905 (C. A. 3); *United States* v. *Kafes*, 214 F. 2d 887 (C. A. 3), certiorari denied, 384 U. S. 887. In such cases, of course, the proof required for conviction would differ from that in a Section 3616 (a) case.

the "manner" of attempted tax evasion alleged in the indictment is, as in this case, the filing of a false and fraudulent return understating the amount of tax due. That such a filing violates Section 145 (b) has been uniformly and repeatedly recognized by this Court (see *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 47; *Spies* v. *United States*, 317 U. S. 492, 499; *Holland* v. *United States*, 348 U. S. 121, 125, 139; *Smith* v. *United States*, 348 U. S. 147, 149, 159) and the courts of appeals. E. g., *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C. A. 1); *United States* v. *Rosenblum*, 176 F. 2d 321, 329–330 (C. A. 7); *United States* v. *Croessant*, 178 F. 2d 96 (C. A. 3), certiorari denied, 339 U. S. 927; *United States* v. *Raub*, 177 F. 2d 312, 315 (C. A. 7); *Rick* v. *United States*, 161 F. 2d 897, 898–899 (C. A. D. C.); *Cave* v. *United States*, 159 F. 2d 464, 466 (C. A. 8).

The filing of a false or fraudulent return with intent to evade tax is also made a misdemeanor by Section 3616 (a); and the section clearly applies to all federal tax returns, including income tax.[9] Both statutes are general in nature, and

[9] As petitioner points out (Br. 9–10), Section 3616 (a) has frequently been utilized by the Government in the prosecution of income tax cases in which the evidence of wilful evasion, though technically adequate to warrant the institution of proceedings under Section 145 (b), shows an offense of such minor importance as to justify the choice of a misdemeanor charge instead of felony. In numerous cases, for example, individual taxpayers evade very small

the scope of the misdemeanor, as has been pointed out, overlaps the scope of the felony in the area within which the facts of this case fall. Does it follow that an offense which falls within the area of overlap can be prosecuted *only* under Section 3616 (a)? That is the necessary result if petitioner's argument is accepted. Under such a view the phrase in Section 145 (b) proscribing attempted evasion "*in any manner*" would be construed as if it read "in any manner except filing a false and fraudulent return." The effect would be to delete from Section 145 (b) "the most common and also the most flagrant method of wilfully attempting to defeat or evade an income tax" (*Rick* v. *United States*, 161 F. 2d 897, 898 (C. A.

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portions of their income taxes by claiming false dependents in their returns. We agree with petitioner, contrary to the court below (see *Dillon* v. *United States*, 218 F. 2d 97, 103), that Section 3616 (a) applies to income tax violations. We think that its unqualified terms, the enactment of the predecessor of Section 3616 (a) in 1864 as part of a Revenue Act which included an income tax (Act of June 30, 1864, c. 173, 13 Stat. 223, 225, 226, 281–285), and its collocation in the Internal Revenue Code of 1939, all point to its applicability to false income tax returns. This construction has been tacitly sustained in a number of cases. *Ex parte Cohen*, 191 F. 2d 300 (C. A. 9), certiorari denied, 342 U. S. 947; *Taylor* v. *United States*, 179 F. 2d 640, 643–644 (C. A. 9); *Kirsch* v. *United States*, 174 F. 2d 595, 597–598 (C. A. 8); *Slick* v. *United States*, 1 F. 2d 897 (C. A. 7); *Ex parte Berkoff*, 65 F. Supp. 976, 979–981 (D. Minn.); *United States* v. *Koppelman*, 61 F. Supp. 1007, 1008–1009 (M. D. Pa.); *United States* v. *Benz*, 24 Fed. Cas. No. 14,576 (N. D. Ill.) see also 10 Mertens, *Law of Federal Income Taxation*, Sec. 55.66.

D. C.))—a result which Congress plainly could not have intended. It would also require the overruling of *Beacon Brass* and countless other cases decided by this Court and the lower courts (*supra*, p. 23) holding that the filing of a false or fraudulent income tax return violates Section 145 (b).

The criminal statutes of the United States are not like a jigsaw puzzle in which all the pieces neatly interlock, with no gaps or laps. Many statutes do overlap, and it is not at all uncommon for a single act or transaction to violate more than one provision. *Pereira* v. *United States*, 347 U. S. 1, 9; *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45; *United States* v. *Gilliland*, 312 U. S. 86, 95–96; *Blockburger* v. *United States*, 284 U. S. 299, 304; *United States* v. *Noveck*, 273 U. S. 202, 206–207; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Hammer* v. *United States*, 271 U. S. 620, 625; *Gavieres* v. *United States*, 220 U. S. 338, 342; *Wood* v. *United States*, 16 Pet. 342, 363.[10] Where there are two statutes proscribing the same conduct, "the rule is to give effect to both if possible." *United States* v. *Borden Co.*, 308 U. S. 188, 198. "It is a cardinal principle

[10] As another example, an attempt to bribe a juror may be punishable as a felony under 18 U. S. C. 206, as a misdemeanor under 18 U. S. C. 1504, or possibly as a criminal contempt under 18 U. S. C. 401. Cf. *Slade* v. *United States*, 85 F. 2d 786 (C. A. 10); *United States* v. *Zullo*, 151 F. 2d 560 (C. A. 3); *Hawkins* v. *United States*, 190 F. 2d 782 (C. A. 4).

of construction that repeals by implication are not favored. * * * It is not sufficient, as was said by Mr. Justice Story in *Wood* v. *United States,* 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' There must be a 'positive repugnancy between the provisions of the new law, and those of the old * * *.'" *United States* v. *Borden Co., supra,* at 198–199.

There is certainly no "positive repugnancy" between Sections 145 (b) and 3616 (a), requiring the conclusion that one impliedly repeals the other *pro tanto,* to the extent that they overlap. And, indeed, if it should be concluded that there is such a repeal by implication, *which* is repealed? Both appear in the same statute, the Internal Revenue Code of 1939. If it be relevant to determine which was the "earlier" (cf. *Adkins* v. *Arnold,* 235 U. S. 417), it may be noted that Section 3616 (a) is derived from a provision originally enacted in 1798.[11] Section 145 (b) is a comparative newcomer, appearing for the first time in the Revenue Act of 1917.[12] Further, if it be relevant to determine which is the "gen-

[11] Act of July 9, 1798, Sec. 11, c. 70, 1 Stat. 580, 586; and see Sec. 3179 of the Revised Statutes, which was the immediate predecessor of Sec. 3616 (a).

[12] Sec. 1004, c. 63, 40 Stat. 300, making the crime a misdemeanor. It was made a felony by the Revenue Act of 1924, Sec. 1017 (b), c. 234, 43 Stat. 253.

eral" provision and which is "specific," it may be noted that Section 3616 (a) applies to *all* tax returns, while Section 145 (b) is limited to *income* tax violations. In another respect, however, Section 145 (b) is broader in that it punishes attempted evasion in *any* manner, without necessarily filing a false return. *Spies* v. *United States*, 317 U. S. 492, 500; *United States* v. *Smith*, 206 F. 2d 905, 908–910 (C. A. 3); *United States* v. *Kafes*, 214 F. 2d 887 (C. A. 3), certiorari denied, 348 U. S. 887. Although the overlap covers a broad area, the offenses defined in the two provisions are not identical, and there is no reason to suppose that Congress did not intend both to exist side by side.

In *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 46, the question was "whether by enacting a statute specifically outlawing all false statements in matters under the jurisdiction of the United States [18 U. S. C. 1001], Congress intended thereby to exclude the making of false statements from the scope of § 145 (b)." The Court answered in the negative, even though the statute of limitations barred prosecution of the defendant under 18 U. S. C. 1001. "We do not believe that Congress intended to require the tax-enforcement authorities to deal differently with false statements than with other methods of tax evasion. By providing that the sanctions of § 145 (b) should be 'in addition to other penalties pro-

vided by law,' Congress recognized that some methods of attempting to evade taxes would violate other statutes as well." (*Ibid.*)

Similarly, in *United States* v. *Noveck*, 273 U. S. 202, the defendant was indicted and convicted of a felony under the general perjury statute (Section 125 of the Criminal Code of 1909) for having filed false income tax returns. He argued that that provision had been repealed *pro tanto* by the precursor of § 145 (b), Section 253 of the Revenue Act of 1918, making it a misdemeanor wilfully to attempt in any manner to defeat or evade the income tax. Rejecting this contention for a unanimous Court, Mr. Justice Brandeis stated: "The offenses defined in the two statutes are not identical. They are entirely distinct in point of law, even when they arise out of the same transaction or act. * * * The fact that perjury is a felony, while filing a false return is only a misdemeanor, presented no obstacle." (273 U. S. at 206–207.) And see *Taylor* v. *United States*, 179 F. 2d 640, 644 (C. A. 9).

To the same general effect, although it is not a tax case, is *United States* v. *Gilliland*, 312 U. S. 86. There the Court sustained convictions under Section 35 of the Criminal Code, as amended in 1934, where the defendants had submitted false and fraudulent reports to a Government agency under the so-called "Hot Oil" Act of 1935, 49 Stat. 30. It was conceded that defendants' acts

violated both Section 35, the general "false statements" felony statute, and the "Hot Oil" Act, which made such acts misdemeanors. It was argued that defendants could be punished only under the latter Act, since it was (a) more specific, dealing with the precise subject-matter involved, (b) later in time, and (c) prescribed a less severe penalty. Arguing for repeal by implication, counsel for the defendants stated (see 312 U. S. 88): "Otherwise, we have the same offense created and punished by two distinct enactments; and at the election of the prosecuting officer the offender may receive as punishment not more than six months in jail or two thousand dollars fine, or ten years in the penitentiary and ten thousand dollars fine." However, the Court held unanimously, per Hughes, C. J., that "There was no express repeal and there was no repugnancy in the subject matter of the two statutes which would justify an implication of repeal. The Act of 1934 [amending Section 35], with its provision as to false and fraudulent papers, has its place as a fitting complement to the Act of 1935 * * *. There is no indication of an intent to make the Act of 1935 a substitute for any part of the provision in § 35." (312 U. S. at 95–96.)

It is clear, therefore, that the fact that this case might have been brought under Section 3616 (a) does not bar prosecution and conviction under Section 145 (b), if the indictment and proof

QUESTION PRESENTED

The Court's order granting certiorari limited review to question (2) presented by the petition for the writ, which reads as follows:

"Whether in a prosecution under a felony indictment for tax evasion under Section 145 (b) of the 1939 Internal Revenue Code, the trial court is required by Rule 31 of the Federal Rules of Criminal Procedure to give a requested misdemeanor instruction under Section 3616 (a) of the 1939 Internal Revenue Code, and thus allow the jury to determine whether defendant committed the greater or lesser offense."

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1939 (53 Stat. 1, Title 26 U. S. C., 1952 ed.):

SEC. 145. *Penalties.*

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or impris-

oned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

SEC. 3616. *Penalties.*

Whenever any person—

(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *

* * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

* * * * *

Federal Rules of Criminal Procedure (327 U. S. 821, 838–39, 854):

Rule 7. THE INDICTMENT AND THE INFORMATION

* * * * *

(c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be al-

leged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

Rule 31. VERDICT

* * * * *

(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

STATEMENT

On May 28, 1954, petitioner was indicted in the United States District Court for the Eastern District of Missouri on three counts of willfully attempting to evade his income taxes for the years 1951, 1952 and 1953 by filing false and fraudulent returns understating the taxes due and owing to the United States, in violation of Section 145 (b) of the Internal Revenue Code of

1939. (R. 5–7.)[1] After a jury trial petitioner was found guilty as charged. (R. 221–222.) On October 28, 1954, the district court entered judgment convicting petitioner of the "offenses of wilfuly and knowingly attempting to evade and defeat a large part of the income tax due and owing" for the years 1951, 1952 and 1953 (R. 235); and he was sentenced to four years imprisonment on each count, the terms to run concurrently (R. 235–236). The Court of Appeals affirmed his conviction on these counts (R. 258).

The evidence to support the verdict may be summarized as follows:

During the prosecution years the petitioner's reported income consisted solely of salary and expenses received from his two employers, Teamsters Union, Local 688, and the Labor Health Institute. (R. 106–107, 110, 115.) The Institute is a medical center, providing medical care and dental services to members of Local 688. (R. 51.) Petitioner was business manager of the Institute, and hired employees, authorized expenditures, and signed checks on the Institute's

[1] Petitioner was also indicted by the same grand jury on two counts of endeavoring to obstruct justice and to influence a grand jury witness by requesting him to destroy certain records and to testify falsely before the grand jury. (R. 1–5.) The two cases were consolidated for trial, and petitioner was found guilty on all counts (R. 221–222.) The Court of Appeals reversed the conviction on one of the two obstruction of justice counts, and affirmed the other. (R. 258.) No question is now before this Court as to either count.

bank account. (R. 52–55, 105, 128, 153). Late in 1950 petitioner induced one Schmidt, who was then doing painting work for the Institute, to falsify his labor costs and to pay over the padded amounts to petitioner. (R. 67–68.) Petitioner received from Schmidt $2,000 in 1951, $2,269.30 in 1952, and $900 in 1953, none of which was reported on his income tax returns. (R. 70–72, 75, 106–107, 110, 115.)

Petitioner also received unreported income in the form of materials and services through other devices which operated in fraud of the Institute. During the prosecution years Schmidt and his associates did approximately $2,500 or $3,000 of painting and other work on petitioner's home, and in 1951 petitioner had another contractor do work at his home at a cost of $1,577.38, all of which was paid for by the Institute. (R. 53–62, 72–73, 136–137.)

On each of the three tax evasion counts, the trial court refused to give the following instruction requested by petitioner (R. 214, 216–217):

> Under the law you may find the defendant guilty of a lesser crime than the crime charged in each count of the income tax indictment.
>
> The statute upon which the lesser crime is based, omitting that part of the act which does not apply in this case, reads as follows:
>
> "Whenever any person * * * delivers or discloses to a collector * * * any false

or fraudulent * * * return * * * with intent to defeat or evade the * * * assessment intended to be made, shall be guilty of a misdemeanor."

Under Count I if you find and believe from the evidence that the defendant delivered, caused to be delivered or disclosed to the Collector of Internal Revenue for the First Collection District of Missouri, a false income tax return with intent to defeat or evade the assessment intended to be made, you will find him guilty of this lesser crime.[2]

* * * * *

(Sec. 3616 (a), Title 26.)

SUMMARY OF ARGUMENT

The trial court was clearly correct in refusing to give the requested instruction. One offense is not "necessarily included" in another merely because, as here, the proof would support a conviction of either offense.

Sections 145 (b) and 3616 (a) overlap in a broad area illustrated by the present case. The filing of a false and fraudulent return understating the amount of tax due violates both sections. It is not uncommon for a single act or transaction to violate more than one federal criminal statute, and there is no reason to suppose that Congress did not intend the two statutes involved here to

[2] Two paragraphs of the requested instruction, repeating the same language as to counts 2 and 3, are omitted here.

co-exist. The fact that one proscribes a felony and the other a misdemeanor presents no obstacle. *United States* v. *Noveck*, 273 U. S. 202, 206–207; *United States* v. *Gilliland*, 312 U. S. 86, 95–96. "Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law * * *" *Rosenberg* v. *United States*, 346 U. S. 273, 294 (opinion of Clark, J.); *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45.

This case presents no question as to the legality of the sentence or the validity of the indictment under Section 145 (b). This Court many years ago laid down basic principles which apply to the instant case: (1) the only object of the "included offense" rule is to enable the jury, if it does not find defendant guilty of the crime charged and if the evidence permits it to do so, to find him guilty of a lesser offense necessarily included in the one charged. *Sparf and Hansen* v. *United States*, 156 U. S. 51, 63. (2) An instruction as to a lesser included offense must be given upon proper request if there is any reasonable view of the evidence under which the jury might properly conclude that the defendant committed only a "lower grade" of the crime charged. *Stevenson* v. *United States*, 162 U. S. 313, 314–316, 321–323. (3) If there is no evidence showing that a lesser crime was committed by the defendant, the instruction can only confuse the jury and should

not be given. *Davis* v. *United States*, 165 U. S. 373, 378–379.

Applying these principles here, we think it is clear that the instruction requested by petitioner was correctly refused. Petitioner concedes that the language "with intent to defeat or evade" in Section 3616 (a) clearly indicates the necessity for proof of willfulness. There is, then, no aggravating ingredient in Section 145 (b) which is not found also in Section 3616 (a). Petitioner's suggestion that the aggravation may consist of a greater "quantum of gravity" or a higher degree of willfulness finds no justification in the statutes, nor did the requested instruction pose any such distinctions. Under no view of the evidence could the jury properly find that petitioner did not willfully attempt to evade or defeat the tax by filing a false and fraudulent return (Section 145 (b)) but that he did file a false or fraudulent return with intent to defeat or evade the assessment (Section 3616 (a)).

Thus, an additional ground justifying the trial court's refusal to give the requested instruction is that it was patently incomplete and erroneous in that it did not purport to advise the jury (1) under what state of the evidence it should consider whether petitioner had violated Section 3616 (a); and (2) what standards should be used in distinguishing between the two offenses.

ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY, AS REQUESTED BY PETITIONER, TO FIND HIM GUILTY OF A VIOLATION OF SECTION 3616 (a) IF IT BELIEVED HE HAD FILED FALSE INCOME TAX RETURNS WITH INTENT TO EVADE THE TAX

1. IN GENERAL: THE NATURE OF THE ISSUE

The precise area of dispute between the parties in this case is quite narrow. This can be shown by stating, in categorical form, several basic propositions on which the Government and petitioner are agreed:

1. In Section 145 (b) of the Internal Revenue Code of 1939, Congress made it a felony to attempt willfully "in any manner to evade or defeat" the income tax. The filing of a false income tax return in an attempt to evade the tax is an offense under Section 145 (b).

2. In Section 3616 (a) of the same statute, the Internal Revenue Code of 1939, Congress made it a misdemeanor to deliver to a collector any false or fraudulent tax return "with intent to defeat or evade" the assessment. The filing of a false income tax return in an attempt to evade the tax is, therefore, also an offense under Section 3616 (a).

3. Sections 145 (b) and 3616 (a) are both valid and are to be given full force and effect. Neither section impliedly repeals or limits the other.

4. In this case the allegations of the indictment and the Government's proof at the trial are sufficient to support a conviction under either Section 145 (b) or 3616 (a). No question is raised as to the validity of the indictment or the legality of the sentence. Both are sustainable under Section 145 (b).

The sole question presented is whether the trial court erred in refusing to charge the jury, as requested by petitioner, to find him guilty under Section 3616 (a) if it believed that he had filed false income tax returns with intent to evade assessment of the tax (R. 216–217). The requested instruction did not tell the jury that, if it found petitioner guilty of the charge against him, it should choose between a felony conviction under Section 145 (b) or a misdemeanor conviction under Section 3616 (a). Nor did it indicate to the jury upon what basis or standard it should make such a choice. In effect, it directed the jury that, if it found petitioner guilty of the acts charged in the indictment, it should convict him of the "lesser offense" of violating Section 3616 (a).

Petitioner contends that such an instruction was required by Rule 31 (c) of the Federal Rules of Criminal Procedure (*supra*, p. 4), which provides that "The defendant may be found guilty of an offense necessarily included in the offense charged * * *." The Government disagrees. In

our view it was not the jury's function to decide *which* statutory provision was violated by petitioner, but only to determine whether the allegations of the indictment had been proved beyond a reasonable doubt. Whether those allegations, if proved, constituted a violation of Section 145 (b) or Section 3616 (a) was not a question of fact to be submitted to the jury, whose function it was to find the facts, not the law. *Sparf and Hansen* v. *United States,* 156 U. S. 51, 101–103.[a]

To entrust the jury with the responsibility for determining which statute has been violated by a defendant would do more than merely impose an improper function on it. To give such a duty to a petit jury is in effect to allow it to make a judgment as to the range of punishment to be imposed. But it is fundamental that, except where specifically empowered by statute, the jury takes no part in the sentencing process. That is the concern solely of the court. Whether, in view of all the circumstances, the sentence should be mild or severe is for the trial court; it is no more a matter for the jury to pass upon than it is for an appellate court to revise. *Sparf and Hansen* v. *United States,* 156 U. S. 51, 64; *Blockburger* v. *United States,* 284 U. S. 299, 305.

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[a] "In this separation of the functions of court and jury is found the chief value, as well as safety, of the jury system. Those functions cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights." *Sparf and Hansen* v. *United States,* 156 U. S. 51, 106.

2. THE "LESSER INCLUDED OFFENSE" DOCTRINE EMBODIED IN RULE 31 (C) IS INAPPLICABLE TO THIS CASE

The "lesser included offense" doctrine has no proper application to this case. That doctrine is, in essence, that where a defendant is charged with a crime having elements *A*, *B*, and *C*, and the jury finds *A* and *B* but not *C*, it may properly convict the defendant of the "lesser" crime containing only elements *A* and *B*. In such a case the jury exercises its function of finding the facts. It does not decide, as petitioner would have it in this case, the question of law as to which statute the defendant violated.

In this case, the offense charged is precisely the same, and contains exactly the same elements, whether it be laid under Section 145 (b) or 3616 (a). No lesser degree of proof is required for one than the other. Hence, there was no rational basis on which the jury could conclude that the Government had not sustained its burden of proof under Section 145 (b) but had done so under Section 3616 (a). In short, there was no issue of fact, so far as deciding which statute was applicable, for the jury to determine.

As required by Rule 7 (c) of the Federal Rules of Criminal Procedure (*supra*, pp. 3–4), which provides that an indictment shall state the statute which the defendant is alleged to have violated, the indictment here specifically alleged violation of Section 145 (b) (R. 5–7). Rule 7

(c) also provides that "Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice." This is a codification of the rule of *Williams* v. *United States,* 168 U. S. 382, 389, which declared that "It is wholly immaterial what statute was in the mind of the District Attorney when he drew the indictment, if the charges made are embraced by some statute in force." Numerous cases have upheld the validity of indictments under statutory provisions other than those under which they were drawn; the citation of an erroneous statute in the indictment will not defeat it if it can be sustained under another statute. See *United States* v. *Hutcheson,* 312 U. S. 219, 229; *United States* v. *Nixon,* 235 U. S. 231, 235–236; *Hammer* v. *United States,* 271 U. S. 620, 625; *Prussian* v. *United States,* 282 U. S. 675, 680; but cf. *United States* v. *Stafoff,* 260 U. S. 477, 481, and *Cole* v. *Arkansas,* 333 U. S. 196, 202. However, we know of no case in which this Court, although sustaining the validity of the indictment under the statute cited therein, nevertheless held that conviction could not be had under that statute because the acts alleged also constituted a violation of some other statute.

Petitioner does not doubt that the "offense charged" in this case, for purposes of applying Rule 31 (c), is violation of Section 145 (b). The

trial court so treated the matter, both in his instructions to the jury (R. 190) and in the formal judgment of conviction (R. 235). Petitioner contends, nevertheless, that Rule 31 (c) made it a question for the jury whether the conviction should be under Section 3616 (a) rather than 145 (b). This contention, we submit, is based on a misconception of the nature and scope of the Rule.

The origin of Rule 31 (c) of the Federal Rules of Criminal Procedure, *supra*, p. 4, is to be found in early English common law. In order for jurors to "well and truly try and true deliverance make between * * * the king and the prisoner," it was "their right to find the prisoner guilty of a lesser charge than that with which he is accused." 3 Holdsworth, *History of English Law* (1923), p. 613. Holdsworth refers, for example, to a grand larceny case in 1367 (Fitzherbert, *Abridgment, Corone* pl. 451 (41 Edw. III)), where the jury brought in a general verdict of guilty together with a special verdict as to a lesser value of the goods stolen, thereby reducing the offense from grand to petty larceny. (*Ibid.*) And see *Salisbury's Case* (1553) Plowden 100, 101, 75 Eng. Rep. 158, 160; *Mackalley's Case*, (1611) 9 Co. Rep. 61b, 77 Eng. Rep. 824; *Respublica* v. *Roberts*, 2 Dall. 124 (Pa.).

In modern law the rule has its application, as Judge Magruder has pointed out, "where the leg-

ences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

SEC. 3651. *Suspension of sentence and probation*

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any fine or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in

addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed. 145.)

SEC. 3616 PENALTIES.

Whenever any person—

(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made;

* * * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed. 3616.)

Federal Rules of Criminal Procedure:

RULE 31. VERDICT

* * * * * *

(c) *Conviction of Less Offense.*—The defendant may be found guilty of an offense

necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

RULE 32. SENTENCE AND JUDGMENT

* * * * *

(e) *Probation.* — After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

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No. 60

In the Supreme Court of the United States

OCTOBER TERM, 1955

LOUIS BERRA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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LOUIS BERRA, PETITIONER

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 247–258) is reported at 221 F. 2d 590.

JURISDICTION

The judgments of the Court of Appeals were entered on April 22, 1955. (R. 259–260.) The petition for a writ of certiorari was filed on May 2, 1955, and was granted on December 5, 1955, limited to the second question presented. (R. 262; 350 U. S. 910.) The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).